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Truth in Savings and the Failure of Legislative Methodology

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ARTICLES

TRUTH IN SAVINGS AND THE FAILURE OF LEGISLATIVE METHODOLOGY

*Eric J. Gouvin**

Introduction	1282
I. Truth in Savings: A Case Study	1287
A. The Witnesses' Problems	1290
1. Misleading and Deceptive Advertising	1291
2. The Bank-Customer Relationship	1293
3. Method of Interest Calculation	1294
B. The Legislative Scheme	1295
1. Misleading and Deceptive Advertising	1297
2. The Bank-Customer Relationship	1299
3. Method of Interest Calculation	1303
C. The Failure of Legislative Methodology	1304
D. Unintended Consequences of the Legislative Response	1306
1. Costs of the Legislation	1306
2. Reduction in Variety of Financial Products	1308
3. Promotion of Interstate Banking	1308
4. Aggravation of Compliance Cost Economies of Scale	1309
5. Reduction of Competition for Deposits	1310
E. The Failure to Consider Alternatives	1311
1. Defer to Regulators	1312
2. Target Specific Practices	1313
3. Create a Consumer Education Program	1314
4. Develop a Government Rating System	1314
5. Foster Industry Self-Regulation	1315
6. Foster Citizen Oversight	1315

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II. Flaws in the Problem-Solving Methodology	1316
A. The Role of Problem Solving in the Legislative Project.....	1318
1. The Justification Role	1324
2. Standard to Evaluate Legislative Behavior.....	1325
3. Neo-Republican Model as Inspiration	1326
B. The Failure to Candidly Identify Values and Facts....	1327
C. Lack of a Sophisticated Model.....	1334
D. The Failure to Distinguish Between Causes and Conditions	1338
E. Lack of Appreciation for the Problem Framers' Power.....	1340
1. Significance of Framing Efforts	1342
2. The Resiliency of the Original Problem	1343
3. The Agenda Setter's Procedural Power	1345
4. The Agenda Setter as Problem Framers	1348
5. Systemic Political Realities.....	1350
III. Prospects for Improving Legislative Methodology	1353
A. Change the Legislative Process.....	1353
B. Require Written Justification of Legislative Enactments	1356
C. Delegate to Non-Congressional Bodies	1358
1. Delegate to Ad Hoc Committees	1359
2. Delegate to Agencies	1360
3. Adopt The Uniform Law/Permanent Editorial Board Model	1361
D. Post-Enactment Review	1364
1. Enhanced Judicial Review	1365
2. Sunset Provisions	1366
3. Oversight Committees	1367
4. Law Revision/Audit Committees.....	1369
E. Institutionalize the Policy Analysis Function	1371
Conclusion	1375

INTRODUCTION

Bismarck once said that there are two things you do not want to witness being made: one is sausage, the other is legislation.¹ In the hundred years since that observation, we have taken impressive steps to ensure the wholesomeness of processed meats, but the legislative

1. See Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 306 (1991); Symposium, *The Legislative Role in the American Republic*, 23 CUMB. L. REV. 7, 24 (1993) (comments of Prof. Martin H. Redish).

process remains unseemly.² Part of the public disillusionment with the legislative process comes from the perception that legislatures are becoming estranged from their fundamental purpose: finding workable solutions to social problems.³ This Article suggests that the failure to find workable solutions results from the failure of legislatures to employ a problem-solving methodology.

The problem-solving enterprise lies at the heart of the legislative effort. Yet, when legislators try to perform that function, their efforts often fall short. The federal Truth in Savings Act (Truth in Savings) provides one example of failed legislative problem solving.⁴ On its face, Truth in Savings is a congressional attempt to solve constituents' problems. The statute, however, appears unlikely to resolve the issues presented to Congress and may even create new and unintended problems that will make matters worse. Truth in Savings, like many other legislative efforts, fails adequately to address constituents' problems because the methodology employed by legislative drafters suffers from a fundamental flaw—it has no built-in mechanism to define rigorously the problem being addressed. Without first identifying the problem, legislation stands little chance of providing an effective solution.

2. At least the public perceives the legislative process to be unseemly. Since the 1970s, public support for Congress as an institution has been quite weak. See Samuel C. Patterson & Gregory A. Caldeira, *Standing Up for Congress: Variations in Public Esteem Since the 1960s*, 15 LEGIS. STUD. Q. 25, 25-30 (1990); see also Kimberly Coursen et al., *Restoring Faith in Congress*, YALE L. & POL'Y REV. 249, 250-56 (1993) (noting similar lack of public support and trust). A comparison of historical polling data prepared by The Roper Center for Public Opinion Research shows that during the past 40 years the public has increasingly viewed Congress as out of touch with the people, unethical, and ineffectual. A *Public Hearing on Congress*, PUB. PERSP., NOV.-DEC. 1992, at 82, 82-88.

3. In the words of Ross Perot, who has come to symbolize the current wave of voter dissatisfaction with government: "Our political system has lost its moorings. It no longer rises to meet new challenges. It seems designed to avoid solving problems." ROSS PEROT, UNITED WE STAND: HOW WE CAN TAKE BACK OUR COUNTRY 21 (1992); see also Donald Rumsfeld, *Foreword* to THOMAS B. CURTIS & DONALD L. WESTERFIELD, CONGRESSIONAL INTENT at xiii, xiii (1992). Donald Rumsfeld, a former member of Congress and cabinet member during the Nixon administration, stated:

Anyone who has served in the Congress of the United States or studied it closely knows that Congress has lost its way. It has departed from its essential purposes and functions as set forth in the U.S. Constitution. It has grown self-satisfied and isolated to a point where it is mistrusted and held in contempt by a startling and worrisome number of Americans.

Id.; cf. Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 564-66 (listing contemporary public concerns regarding the democratic process).

4. Truth in Savings Act, §§ 261-274, 12 U.S.C. §§ 4301-4314 (Supp. V 1993).

Legal scholars have been slow to give the subject of legislative methodology the attention it deserves.⁵ Although statutes cover much of the legal landscape and have to a great degree eclipsed the common law in importance,⁶ most legal scholarship still focuses on the judge's art, rather than the legislative drafter's art. This Article counters that prevailing tendency by considering an important aspect of legislative methodology—the framing of problems for legislative attention and the selection of appropriate legislative responses.

The problem-framing exercise as an aspect of legislative drafting has received remarkably little attention.⁷ Most discussions of statutes and the legislative process skip over the process of framing the problem and assume the existence of a problem that is being, or has been, addressed in the legislature. Articles dealing with statutory interpretation, for instance, deal with a statute that has already been drafted and enacted into law.⁸ Although scholars examining techniques for legislative interpretation sometimes try to determine the original problem Congress sought to address, their purpose for doing so is to aid in the interpretation of the law, rather than to help shape the law's initial design.⁹ Similarly, many excellent works describe the process by

5. Some scholars have called for the development of a general theory of legislation to correct this neglect. See Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutional Approach to the Memorandum of Law, Legislative Theory, and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 2-3 (1992); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369-71 (1989).

6. As far back as 1947, the number of controversies before the United States Supreme Court that did not involve a statute had declined to almost zero. Since that time, both Congress and the various state legislatures have considered tens of thousands of new proposals for legislation every year. See Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1753 (1982).

7. The only two articles that I am aware of which discuss the matter of problem framing in the context of legislative drafting are Rubin, *supra* note 1, and Seidman, *supra* note 5.

8. This Article does not address the topic of statutory interpretation. Rather, it is concerned with the need to frame problems in order to promote a legislative problem-solving methodology and to improve the substance of legislation. Although a more effective problem-solving methodology will likely result in more transparent laws which, in turn, should facilitate statutory interpretation, this Article focuses on the problem-framing step within the larger project of creating the substantive provisions of a statute, rather than on the interpretation of existing statutes.

9. Traditionally, interpreters of statutes have inquired into the purpose of a statute to understand the statute's meaning. Such an exercise assumed that inquiring into the purpose was merely an "archeological" exercise that would yield a determinate answer. T. Alexander Alienikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988). The archeological approach can be used to interpret statutes under the various "originalist" theories of statutory interpretation. Originalist theories include "intentionalism," which focuses on the drafters' intention, see, e.g., Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983), "purposivism," which focuses on the original purpose behind the legislation (an approach most frequently attributed to Henry M. Hart, Jr. and Albert M. Sacks), see, e.g., William N. Eskridge, Jr. &

which bills become law.¹⁰ Yet, these works, too, pay only cursory attention to the task of specifically identifying the problem the bill was designed to address or, alternatively, they just assume the existence of a drafted bill that has been placed in the legislative hopper.¹¹ Finally, some literature deals with the way bills should be drafted as a matter

Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332-39 (1990), and "textualism," which focuses on the "plain meaning" of the statute's text as adopted by the legislature, see, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

Originalist theories of statutory interpretation have been severely criticized. See, e.g., Eskridge & Frickey, *supra*. Scholars have pointed out that trying to determine the intent or the purpose a legislature had in mind when it passed a statute is a fool's errand because legislatures do not speak with one voice; therefore, attempts to determine a particular intent or purpose must fail. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) [hereinafter Easterbrook, *Statutes' Domains*]. Textualism has received criticism for failing to deal with the inherent uncertainties of language, especially in light of the modern scholarship dealing with the intimate interaction between the reader and the text. See, e.g., Francis J. Mootz, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993).

Nevertheless, the approaches to statutory interpretation seeking to supplant originalist techniques continue to undertake an inquiry into the purpose of the legislation. See, e.g., Alienikoff, *supra* (arguing that current values confronting courts cannot and should not be excluded from the courts' interpretation of statutes, but that originalist techniques play a role); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (being informed by hermeneutics and arguing for interpretations that are coherent when viewed in the context of a larger web of beliefs, including the intent, purpose, and text of the law); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 537 (1992) (proposing an approach to statutory interpretation, after reviewing and updating the views of Karl Llewellyn, based on "practical reason," rejecting the view that normative conclusions can be deduced from a single unifying principle and instead permitting a judge to consider many factors in the interpretation process, including the presumed purpose of the statute); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991) (refuting the trend toward textualism and arguing for a system of "comprehensive rationality" that would allow judges to take into account both normative theory and pragmatic considerations, including the purpose of the statute).

10. See, e.g., WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* (7th ed. 1989); ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973); STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND THE SENATE* (1989).

11. For instance, in his famous descriptive account of the evolution and eventual adoption of the National Health Service Bill, Eric Redman spends approximately three pages of the 298-page account discussing the problem that the law was supposed to correct—the shortage of doctors in poor areas. REDMAN, *supra* note 10, at 31-33. The proponents of the legislation engaged in no formal analysis of the problem. *Id.* The idea for the legislation seems to have come from Dr. Abe Bergman, an advisor to Senator Magnuson, who believed that the National Health Service Corps would be more successful than other programs had been at bringing doctors to poor areas. *Id.* at 31. Other than Dr. Bergman's personal understanding of why doctors choose to locate their practices in middle class communities rather than in poor communities, no attempt was made to determine the cause of the doctor shortage or to correct that cause. *Id.* at 32-33. Instead, the bill introduced to Congress followed Dr. Bergman's concept. *Id.* at 34-38.

of legal writing.¹² These works, however, also avoid an in-depth discussion of the problem-framing task.

The problem-framing aspect of the legislative drafting process deserves closer attention. As part of a true legislative problem-solving methodology, the problem-framing step should provide the foundation upon which the legislative drafter builds the entire statute. Legislators should evaluate the appropriateness of the proposed solution in light of the problem identified. In turn, alleviating the problem should serve as a standard against which to judge the effectiveness of the statute.¹³ By adopting a problem-solving methodology, drafters can improve the quality of legislation.

Extrapolating from the experience of Truth in Savings, this Article examines the common failure of legislatures to analyze carefully the policy choices they make, and it identifies the reasons why the legislative process fails as a problem-solving method. While this Article focuses on Truth in Savings as one example of congressional lawmaking, much of what follows applies to the legislative process generally.¹⁴ Because proposals for legislation come from so many different sources,¹⁵

12. See, e.g., REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* (2d ed. 1986); LAWRENCE E. FILSON, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* (1992); DONALD HIRSCH, *DRAFTING FEDERAL LAW* (2d ed. 1989); MAXWELL J. MEHLMAN & EDWARD G. GROSSMAN, *YALE LEGISLATIVE SERVICES HANDBOOK OF LEGISLATIVE DRAFTING* (1977).

13. Legislative drafters receive remarkably little reliable feedback concerning the success or failure of legislative enactments. As a matter of designing more effective legislation, drafters need a more reliable feedback loop in order to evaluate whether a bill has failed to achieve its purpose. On this point, designers of statutes could take a lesson from the designers of tangible artifacts. Engineers of tangible artifacts have long-recognized that when an object fails to perform its function well, its design must be changed in order to make it more effective. Artifacts evolve in this manner—in the words of Professor Henry Petroski, “form follows failure.” HENRY PETROSKI, *THE EVOLUTION OF USEFUL THINGS* 22-33 (1992). Without failure, artifacts do not evolve. This engineering principle should apply to statutes as well, which, after all, are intangible artifacts produced by “social engineers.” Designers of statutory artifacts must have some way to determine a statute’s success or failure in order for the design of the legislative artifact to improve. Without identifying the problem that the statute addresses, however, we cannot evaluate its failure or success. Without the prospect of failure, the design process loses a vital link and hopes dim for more effective legislation.

14. More specifically, this Article focuses on the substantial number of bills that come into being from the drafting efforts of a member of Congress without explicit policy analysis from institutional analysts such as the General Accounting Office, the Office of Technology Assessment, the Congressional Budget Office, or the analysts in an executive or administrative office.

15. Proposals for legislation considered by Congress come from many different sources. Businesses, public interest groups, trade associations, constituents, executive departments, and administrative agencies all produce draft bills for introduction to Congress. In addition, members of Congress can originate legislation. The bills they prepare may be the result of years of study by a special commission or executive branch department, may be the work of congressional committees, or may be the fulfillment of a campaign promise or the result of personal experiences. As a result of these diverse paths,

however, and because the course of their development varies as well, not all of these observations apply with equal force to all types of proposed legislation. The idea of developing a more explicit legislative problem-solving methodology, however, lies at the heart of this Article, and that central idea applies to all bills—regardless of how they come into being.

This Article is divided into three parts. Part I presents a case study of Truth in Savings as a failed congressional attempt to solve a perceived problem. Part II examines the deficiencies in the problem-solving methodology employed in the legislative process that produced Truth in Savings. Finally, Part III discusses prospects for improving the methodology employed in the legislative process.

I. TRUTH IN SAVINGS: A CASE STUDY

Although most Americans are taught in civics class that bills are introduced into Congress when enough citizens say “there ought to be a law,”¹⁶ the actual legislative process does not always work this way.¹⁷ Instead of starting the legislative process with constituents crying out for a solution to a recognizable problem, Congress frequently starts the process with a draft-bill solution and then proceeds to hold hear-

blanket statements about the way in which bills come into being are difficult to make. ROBERT U. GOEHLERT & FENTON S. MARTIN, CONGRESS AND LAW-MAKING: RESEARCHING THE LEGISLATIVE PROCESS 10-11 (2d ed. 1989); EDWARD F. WILLETT, JR., HOW OUR LAWS ARE MADE, H.R. DOC. NO. 139, 101st Cong., 2d Sess. 4-5 (1990).

16. The “civics class” model of legislative behavior permeates our culture. A cartoon that aired regularly on the ABC television network in the 1970s, entitled “I’m Just a Bill,” accurately summarizes the civics class model of legislative behavior. *Schoolhouse Rock: History Rock — I’m Just a Bill* (ABC television broadcast, 1973) (video copy on file with author). The cartoon told about a small town where school buses regularly crossed the railroad tracks. The townspeople worried that trains might not be visible to the bus drivers. They wanted to make school buses stop at railroad crossings. They called their congressional representative and he said, “You’re right, there ought to be a law.” Then he drew up a bill and introduced it to Congress. “Bill,” an anthropomorphic piece of paper, starred in the cartoon. He sat on the capitol steps and sang a song, part of which described the committee process and suggested that he would have to wait “while a few key Congressmen discuss and debate whether they should let me be a law.” Bill did eventually get signed into law by the President. This cartoon crystallizes the civics class model of the legislative process that most Americans learned in school. In this model, legislation is a method of solving social problems. Legislators are motivated to solve those problems out of a sense of civic duty. These civic-minded representatives deliberate to find the best outcome for the process. They do not make special deals for themselves or act solely to ensure their reelection.

17. For instance, in the case of Truth in Savings, the chief sponsor of the bill during the 1980s—Representative Lehman of California—stated that his motivation for introducing the legislation came from personally viewing misleading advertisements, not from constituents’ pressure. *The Truth in Savings Act: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking Finance and Urban Affairs*, 98th Cong., 2d Sess. 5 (1984) [hereinafter 1984 Hearings].

ings to find out what the problem is.¹⁸ The proposed legislative solution may be modified in response to comments of witnesses or concerns of legislators, but, in many cases, to a great extent the basic first solution directs the evolution of the bill.¹⁹

Of course, not all legislation develops in the same way. Some congressional efforts in especially complicated or politically sensitive areas such as social security reform,²⁰ military base closings,²¹ bankruptcy law,²² and copyright law²³ have departed radically from the typical

18. Many commentators have noted Congress' propensity to propose "solutions" without first figuring out what the "problems" are. Professor Linda Mullenix has discussed the development of the Civil Justice Reform Act of 1990 as a solution in search of a problem. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993). Professor Rubin described a similar situation in connection with Truth in Lending. See Rubin, *supra* note 1, at 268-69. Eric Redman described the hearing process in the case of the National Health Service Bill as a window-dressing exercise, where the witnesses were carefully chosen to establish the existence of a preconceived problem that the legislation addressed and to support the bill's approach to that problem. REDMAN, *supra* note 10, at 114-37. Of course, sometimes the "bill" submitted for consideration is not seriously considered a solution to a problem, but rather is merely an "idea draft" that makes a general point but is not fully fleshed out. The "idea draft bill" might be proposed as a formality in order to initiate the legislative process, hold hearings, and determine the best way to proceed. FILSON, *supra* note 12, at 35.

19. Roger Purdy, *Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems*, 11 SETON HALL LEGIS. J. 67, 98 (1987).

20. In the early 1980s, republicans and democrats in Congress assembled an ad hoc committee—the National Commission on Social Security Reform—to prepare legislative reforms to the Social Security System, thereby avoiding the possibility of unmitigated partisan political battles over the much-needed legislation. Warren Weaver, Jr., *New Panel Asked on Social Security*, N.Y. TIMES, Sept. 7, 1981, at A8.

21. Congress recognized the need to reduce the military budget and to eliminate unnecessary military installations. Susan F. Rasky, *House Votes Bill That Could Bring Shutdown of 20 U.S. Bases in '89*, N.Y. TIMES, July 13, 1988, at A1. Closing a military base has historically been a difficult task because of the political difficulties of removing an important economic activity from a congressional representative's district. To avoid the unpleasant political realities of the base-closing decision, Congress established a commission to undertake the task of identifying bases to be closed. *Id.* Once the commission prepared its list, Congress could only act to reject the entire list, not individual sites on the list. *Id.* The vote to reject the list would require a two-thirds majority to carry. *Id.*

22. In the early 1970s, faced with the daunting task of revising the bankruptcy law, Congress established the Commission on the Bankruptcy Laws of the United States to "study, analyze, evaluate, and recommend changes" in the existing bankruptcy law. S.J. Res. 8, 91st Cong., 2d Sess. (1970) (enacted as Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970)). The Commission held public hearings, gathered evidence, sought the views of interested parties, and made a general study of the bankruptcy system. After its two-year study, the Commission reported its findings to Congress in 1973. COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. (1973). The bankruptcy law was eventually revised in 1978.

procedure. The recent experience with health care reform also provides an alternative model for the production of legislation.²⁴ In addition, most substantive bills originate in the executive branch or in the administrative agencies.²⁵ Often those agencies have an internal policy analysis function that defines the problem with some rigor before considering solutions.²⁶ Nevertheless, for many of the remaining bills generated in a given session of Congress, the initial development of the legislative solution evolves without the benefit of an explicit problem-identification or policy-analysis process.²⁷ This Article examines one of those bills, Truth in Savings.

After considering the idea for twenty-three years,²⁸ Congress passed Truth in Savings as part of the Federal Deposit Insurance Corporation Improvement Act of 1991.²⁹ Truth in Savings regulates the way depos-

23. U.S. copyright law was comprehensively revised in 1976, culminating a long process initiated by the Legislative Appropriations Act of 1955, which appropriated funds for the Copyright Office to conduct a thorough review and reevaluation of the existing copyright law. The Copyright Office delivered its "Report of the Register of Copyrights on the Revision of the U.S. Copyright Law" to Congress in 1961. 1 Copyright L. Rep. (CCH) ¶ 1 (Oct. 1988). A revised copyright law was finally passed 15 years later after many congressional hearings and false starts. *Id.*

24. The Clinton administration's approach on health care reform has been to canvas the nation to seek the views of various constituencies. This fact-finding project was conducted to flesh out the issues and was not linked to any specific statutory language. Although when the actual proposal was unveiled it precipitated the predictable political wrangling, the great deal of presubmission homework done on this matter sets it apart from the typical bill considered by Congress. The administration's approach to policymaking may reflect a communitarian philosophy. See Amitai Etzioni, *Is Bill Clinton a Communitarian?*, 82 NAT'L CIVIC REV. 221 (1993).

25. FILSON, *supra* note 12, at 29 ("Most bills taken seriously in any legislative forum are simply designed to clear up difficulties that have come to light in the everyday administration of some existing law or program.").

26. Most executive departments and administrative agencies have policy analysts on staff. In addition, all bills that originate in the administration must be cleared through the Office of Management and Budget's (OMB) Legislative Reference unit, which acts as a clearing house for administering proposed bills. JOHN M. KERNOCHAN, *THE LEGISLATIVE PROCESS* 9-10 (1981). For a general discussion of the strong points and shortcomings of the OMB's policy-analysis function, see THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 271-91 (1991).

27. Of course, not all bills originating in Congress lack this step. As an institution, Congress does have several resources to call on for policy analysis, including the Office of Technology Assessment, the Congressional Budget Office, and probably most importantly, the General Accounting Office. For example, the General Accounting Office has assessed pending legislation to reduce financial regulation in light of existing safety and soundness policies. See *GAO Warns Against Weakening FDICIA*, Fed. Banking L. Rep. (CCH) No. 1515, at 6 (Oct. 1, 1993) (citing GENERAL ACCOUNTING OFFICE, *BANK AND THRIFT REGULATION: FDICIA SAFETY AND SOUNDNESS REFORMS NEED TO BE MAINTAINED* (1993) (assessing H.R. 962, the "Economic Growth and Financial Institutions Regulatory Paperwork Reduction Act of 1993"))).

28. See *infra* note 222.

29. Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified as amended in scattered sections of 12 U.S.C.).

itory institutions may advertise deposit accounts and also requires comprehensive disclosure of deposit account terms, such as the method by which interest will be calculated and the fees that will be imposed.³⁰ If we assume that Congress enacted Truth in Savings to correct a social problem,³¹ the hearings held on the Act should shed some light on the specific problems Congress was attempting to address.

This section of the Article describes the problems that proponents of the legislation identified during the hearings on the Act and the legislative response to those problems. It also includes a critique of the legislative response.

A. *The Witnesses' Problems*

We will never know for certain what underlying problems Truth in Savings was supposed to address. Like with many statutes, no place exists in the vast legislative materials that accompanied this relatively modest statute to determine exactly what phenomenon the law aimed to correct. One can scour the committee and subcommittee hearings and learn of many different problems. The difficulty in trying to divine *the* problem is that witnesses identified many problems of various scope and severity during the hearings, while those same problems were denied by other witnesses. Of course, because congressional hearings only took place after the bill had been drafted, it is difficult to say that the bill responded to any problem in particular, other than its sponsor's personal discomfort with what he considered misleading advertising of deposit products.³² The hearings, therefore, do not set

30. Truth in Savings Act, §§ 263-268, 12 U.S.C. §§ 4303-4308 (Supp. V 1993).

31. The assumption that Congress enacts laws in order to solve problems may strike some readers as questionable. One's theory of legislative behavior may shape one's perception of the significance of Congress' problem-solving role. The most recent debate about legislative behavior seems to come down to a competition between two world views—the republican model and the public choice model—although each of these models in turn has given rise to numerous related or derivative approaches (such as liberal republicanism and positive political theory). The republican model posits that problems of concern to the community are addressed through public-spirited deliberation in the political arena. See Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1698 (1989). A competing model of legislative behavior, sometimes called the public choice model, holds that legislation amounts to nothing more than a product that effects a wealth transfer from one group to another. For a general discussion, see Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

I believe that whether one adopts a republican view, a public choice view, or a combination of the two, problem solving provides the central focus of the legislative effort. Whether the problem has been identified by the people or by an interest group, the legislative drafter must still confront the challenge of identifying the purpose of the legislation and devising an effective method to achieve that end. See *infra* notes 165-73 and accompanying text.

32. See 1984 Hearings, *supra* note 17, at 5.

out an explicit and coherent articulation of the problem that Truth in Savings was designed to address.

Nevertheless, the congressional testimony reveals a pattern among witnesses who supported the proposed legislation. They perceived the need for federal action on at least three grounds: (1) misleading and deceptive advertising, especially in connection with "teaser" rates on individual retirement accounts;³³ (2) the inherent unfairness in the relationship between banks and their customers due to unequal bargaining power;³⁴ and (3) the confusing (and perhaps unconscionable) array of methods by which depository institutions legally could calculate interest.³⁵

1. Misleading and Deceptive Advertising

Historically, unfair advertising practices have not been a major problem in the banking industry.³⁶ During the 1970s, however, the financial services industry experienced tremendous changes. Non-bank providers of financial services, such as mutual funds and insurance companies, began to compete actively for depositors' dollars. As the 1970s drew to a close, bankers found themselves in an intensely competitive market.

33. See *id.* at 11-25, 48-52 (statements of Thomas G. Riley, Senior Vice President, Washington Federal Savings & Loan, and Albert Sklar, Member, American Association of Retired Persons, respectively).

34. See *id.* at 52-57 (statement of Mark Hannaford, President, Bankcard Holders of America).

35. See *id.* at 25-32 (statement of Stephen Brobeck, Executive Director, Consumer Federation of America, Washington, D.C.).

36. The lack of abusive advertising came about largely as a result of Regulation Q, 12 C.F.R. §§ 217.1-6 (1993), which, prior to 1980, set the maximum interest rates that banks could pay for deposits. See Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 681-82 (1987). The Regulation aimed to increase the stability of the banking system by eliminating dangerous competition between banks for deposits. JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 30-31 (1992). Because banks were limited by law as to the interest rate they could pay on deposit accounts, when banks competed with each other for deposit accounts they were precluded from engaging in a "price war" by offering more and more attractive rates. *Id.* Instead, as a method of product differentiation, banks focused on other incentives, such as premiums or no cost or no fee accounts to attract depositors. *Id.* During the halcyon days of Regulation Q, bankers attracted deposits while paying low interest, then lent the money at a higher interest rate and profited from the spread between the two. These were the days of "3-6-3" banking: bankers took money from depositors at 3%, lent it to borrowers at 6%, and were on the golf course by 3:00. John S. Gordon, *Understanding the S&L Mess*, AM. HERITAGE, Feb./Mar. 1991, at 49, 65. The spread was attractive because Regulation Q kept the cost of the deposits artificially low.

In 1980, Congress responded to the realities of the financial marketplace and ordered interest-rate ceilings phased out.³⁷ When the artificial regulatory constraints on the price of deposits disappeared and deposit interest rates soared, the traditional wide spread between deposit rates and loan rates disappeared.³⁸ In light of the shrinking interest rate spread, noninterest income, in the form of fees and charges, began to play an increasingly important role in the finances of banks.³⁹ This development resulted in banks' charging fees for services and products they had previously provided for free. At the same time banks were increasing fees to offset the loss of interest income, they also changed their marketing tactics to attract deposit accounts. The intense competition for deposits resulted in the development of marketing-driven deposit products designed to lure customers away from money market funds. Some of the deposit products were advertised in a deceptive and misleading manner.⁴⁰

The abusive advertising practices were not, however, taking place in a legal vacuum. Federal regulators had the authority to regulate advertising and, in fact, had promulgated regulations to address the issue.⁴¹ The regulators' response, however, was not enough for many

37. Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, § 204, 94 Stat. 143 (codified at 12 U.S.C. § 3503 (1988)). For a general discussion of the legislation, see Ronald L. Weaver & Andrew M. O'Malley, *The Depository Institutions Deregulation and Monetary Control Act of 1980: An Overview*, 98 BANKING L.J. 100 (1981).

38. The decline in the interest-rate spread was quite dramatic. For example, in 1975, a bank could lend money to a corporate customer at two percentage points above the bank's cost of funds. By 1985, that spread had shrunk to about half a percentage point. Sarah Bartlett, *Are Banks Obsolete?*, Bus. Wk., Apr. 6, 1987, at 74, 75.

39. Banks began to appreciate the importance of activity-related fees, such as commitment fees, origination fees, points, trust services, and other charges that extracted income from customers without relying on a stream of interest income from the borrowing relationship. DONALD R. FRASER & JAMES W. KOLARI, *THE FUTURE OF SMALL BANKS IN A DEREGULATED ENVIRONMENT* 200-01 (1985); Richard I. Kirkland, Jr., *Banks Seek Life Beyond Lending*, FORTUNE, Mar. 3, 1986, at 54. In addition, bankers focused on ways to reduce costs as a way to improve their profitability. *Id.* at 56.

40. Even bankers admitted that some account advertising crossed the line into the realm of the misleading. Laura L. Mulcahy, *Fine Print in New Account Ads Draws Some Complaints; But DIDC Spokesman Says Deregulation Requires Consumers to Be More Astute*, AM. BANKER, Feb. 1, 1983, at 1. The hearings held in 1984 on an early version of Truth in Savings legislation were full of examples showing abusive advertising practices by banks attempting to lure depositors. See 1984 Hearings, *supra* note 17, *passim*.

41. Prior to the adoption of Truth in Savings in 1991, applicable federal banking regulations relating to deposit account advertising and disclosure included the following: (1) Regulation Q, 12 C.F.R. § 217.6 (1989), for national banks and state chartered member banks; (2) 12 C.F.R. § 329.3 (1989), for state-chartered nonmember banks insured by the FDIC; and (3) 12 C.F.R. § 563.27 (1989), for institutions under the jurisdiction of the Office of Thrift Supervision. The regulations were fairly consistent with each other and dealt primarily with deposit account advertising. Among other things, they required the following: (1) that interest rates be stated in terms of the annual rate of simple interest, 12 C.F.R. §§ 217.6(a), 329.3(a), 563.27(a)(1); (2) that the percentage-yield figures be based

consumer groups, or legislators,⁴² who used the emergence of misleading advertising to renew the campaign for Truth in Savings.⁴³

2. The Bank-Customer Relationship

The changing economics of the banking industry resulted in fees and charges for services that had previously been provided for free. While these fees were not illegal, they often came as an unwelcome surprise to the customers who had to pay them.⁴⁴ Customers frequently were unaware that their banks had the right, under the form documents that created the account, to impose fees unilaterally and raise them at will.⁴⁵

on a period of not more than one year and, if such a figure is used, that the annual rate of simple interest also be stated with equal prominence, with a reference to the period of compounding, §§ 217.6(b)(c), 329.3(b)(c), 563.27(a)(2)(3); (3) that any time or amount requirements necessary in order to earn the advertised rate be clearly and conspicuously stated, §§ 217.6(d), 329.3(d), 563.27(a)(4); (4) that advertising for time deposits include a clear and conspicuous statement that a substantial penalty is required for early withdrawal, §§ 217.6(e), 329.3(h), 563.27(a)(5); and (5) that banks not engage in advertising that is inaccurate, misleading, or that misrepresents its deposit contracts, §§ 217.6(g), 329.3(f), 563.27(b).

42. See 1984 Hearings, *supra* note 17, at 6 (statements of Rep. Lehman).

Many people ask what the Federal bank regulators are doing to stop these advertising practices, and to be fair I must say that they are trying. However, the mail from my constituents who have asked the Federal Reserve Board to intervene on their behalf indicates that the Fed seeks to appease dissension between depositors and financial institutions, rather than looking out for the rights of the consumer.

Id.

43. Mulcahy, *supra* note 40.

44. As a legal matter, banks have no special duty to provide full and fair disclosure to their customers about the fees or material terms of the relationship. The law of debtor and creditor governs the relationship between a bank and its deposit account customer. *Denison State Bank v. Madeira*, 640 P.2d 1235, 1243 (Kan. 1982); *Consolidated Bearing & Supply Co. v. First Nat'l Bank*, 720 S.W.2d 647, 650 (Tex. Ct. App. 1986). A bank has no duty of disclosure to a customer unless a fiduciary relationship exists. See *Barnett Bank v. Hooper*, 498 So. 2d 923, 925 (Fla. 1986) (holding that bank could have duty to disclose to customer certain material facts peculiarly within bank's knowledge and not otherwise available to customer where bank had fiduciary or confidential relationship with customer and stood to gain financially at expense of customer); *Macon County Livestock Mkt. Inc. v. Kentucky State Bank*, 724 S.W.2d 343, 349-51 (Tenn. Ct. App. 1986) (holding that bank had no duty to disclose to customer information concerning customer's business associate). For a discussion of those situations where a bank might be considered to have a fiduciary relationship with its customer, see Neils B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 40-43 (1992).

45. A depositor usually creates the deposit-account relationship with a bank by executing a "signature card." The fine print on most signature cards reserves to the bank the right to unilaterally change the terms of the agreement. While the typically onerous terms of these bank form documents have been challenged by disgruntled customers, they rarely win. See, e.g., *Jacobs v. Citibank*, 462 N.E.2d 1182, 1183-84 (N.Y. 1984) (holding that bank charges to customers who had checks returned for insufficient funds, where charges exceeded actual overdraft processing costs, did not breach deposit-account agreement and

Although bankers usually held the upper hand in the relationship with their customers (partly through the use of onerous form documents), their position of primacy was severely shaken by a 1985 California class action suit, *Perdue v. Crocker National Bank*.⁴⁶ In *Perdue*, the plaintiffs' causes of action for unconscionability and breach of good faith based on the bank's form documents survived a motion for summary judgment.⁴⁷ Although the case settled before being tried, it sent shock waves through the banking community.⁴⁸ The case made bankers realize that their once hallowed form documents were subject to the same contract analysis as other standard business forms.

3. Method of Interest Calculation

Confusing, deceptive, and arguably unconscionable methods of calculating interest on deposit accounts emerged as a third problem revealed by Truth in Savings' proponents during the congressional testimony.⁴⁹ The phase out in the early 1980s of federal limits on the

were not "penalties" in violation of UCC provisions on liquidated damages); *Dietrich v. Chemical Bank*, 454 N.Y.S.2d 490, 490-91 (Sup. Ct. 1981), *aff'd*, 459 N.Y.S.2d 1016 (App. Div. 1983) (holding that by signing a signature card and receiving a copy of pertinent rules and regulations, a customer assented to the bank's service charges as term of the deposit relationship, and the bank did not breach its contract by imposing fees for checks returned for insufficient funds, even though the fees charged may have been, as alleged by plaintiff, "grossly disproportionate to the actual costs, if any, incurred").

46. 702 P.2d 503 (Cal. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). In *Perdue*, the plaintiff claimed his bank's charges for checks returned for insufficient funds were unconscionable and invalid. *Id.* at 508. The California Supreme Court held that the signature card signed by the depositor was, "as a matter of law," a contract that authorized the bank to impose fees and charges, even though the plaintiff had argued lack of mutual assent. *Id.* at 509-10. The court also found, however, that the bank's power to impose fees and charges was subject to a duty of good faith and fair dealing. *Id.* at 510. The court characterized the signature card as "a classic example of a contract of adhesion." *Id.* at 511. Under the contract of adhesion analysis, the plaintiff's claim that the charges were unconscionable stated a cause of action because the court found that there could be "price unconscionability" in the deposit account context. *Id.* at 512.

47. The *Perdue* case has been followed in at least one other jurisdiction. See *Best v. United States Nat'l Bank*, 714 P.2d 1049, 1053 (Or. Ct. App.), *aff'd*, 739 P.2d 554 (Or. 1986). The *Best* case was another class action claiming unconscionability and invalidity of charges for checks returned because of insufficient funds. *Id.* at 1050. The court held that the power of the bank to set charges under the account agreement is not unlimited, but rather must be exercised within an implied covenant of good faith and fair dealing. *Id.* at 1056.

48. See, e.g., William Alsup & Lawrence Lincoln, *A Management and Litigation Strategy Under Perdue*, 42 BUS. LAW. 893 (1987); Michael D. Finnegan, *Perdue v. Crocker National Bank — The Attack on Pricing*, 41 BUS. LAW. 997 (1986); Robert L. Lofts, *The Perdue Case and Other Litigation Involving Bank Charges*, 42 CONSUMER FIN. L.Q. REP. 97 (1988).

49. This problem had existed even under Regulation Q, when banks were limited by law as to how much interest they could pay. Because of the many variables that go into the calculation of interest, two banks could claim to offer the "highest interest allowed by law" and yet pay their depositors radically different amounts of interest. Among the many variables affecting the amount of interest earned are such matters as frequency of

amount of interest banks could pay on deposits⁵⁰, resulted in ever more complicated methods of calculating interest as the banking industry developed new marketing-driven products, thereby aggravating the perceived problem of interest calculation methods.⁵¹

Proponents of Truth in Savings found the myriad methods of calculating interest on deposit accounts unnecessarily complicated and confusing to the average customer.⁵² In addition, the proponents testified that some methods of interest calculation were not only confusing to the customer, but were actually unconscionable.⁵³ The consumer groups called for the "investable balance" method of interest calculation to be banned. In their testimony, these witnesses clearly considered Truth in Savings to be more than a disclosure statute. To them, it regulated the substantive aspects of deposit accounts as well.⁵⁴

B. The Legislative Scheme

Supported by the testimony presented in the hearings, Congress considered—and eventually passed—a bill to require comprehensive

compounding, whether the bank uses a 360- or a 365-day year, minimum balances, computation of balance upon which interest is paid, and service charges. Michael J. Bonfanti, *Truth In Savings — Is There a Need?* 1 (1981) (unpublished thesis, Graduate School of Retail Bank Management, University of Virginia) (on file with author).

50. See *supra* note 38.

51. *Deregulation Has Potential for Consumer Confusion, Abuse*, AM. BANKER, July 12, 1983, at 6.

52. For instance, a survey by the Consumer Federation of America found that there were more than 50 different ways of describing the balance on which a customer would earn interest. See *Fees for Routine Bank Services Climbed Sharply in Last Year, CFA Study Finds*, 48 Banking Rep. (BNA) No. 23, at 997 (June 8, 1987) [hereinafter *CFA Study*]. To make matters even more complicated, the survey found little standard terminology in the brochures and other material received from various banks. *Id.*

53. In their testimony, the consumer groups complained most vociferously about a method of calculation called the "investable balance" method, where the depository institution paid interest only on that portion of the money not tied up in reserve requirements. *Truth in Savings, H.R. 447: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 1st Sess. 51-55 (1991) [hereinafter *1991 Hearings*] (testimony of Edmund Mierwinski, consumer advocate representing U.S. PIRG, Consumers Union, and the Consumer Federation of America).

54. For example, the Consumer Federation of America and U.S. PIRG would have preferred to move beyond mere disclosure and to pass legislation regulating banks like public utilities. *Consumer Groups Allege Price Gouging*, Fed. Banking L. Rep. (CCH) No. 1499, at 6 (June 11, 1993). Their approach to Truth in Savings indicates a tendency for substantive regulation of banking practices, rather than mere disclosure. Sensing that the goal of regulating banks as public utilities is politically impossible, however, these consumer groups may be attempting to get their agenda adopted piecemeal. In addition to Truth in Savings, they have championed life-line accounts and government check-cashing laws. *Id.*

disclosure of deposit account terms.⁵⁵ On its face, Truth in Savings

55. Comprehensive account disclosure has been the essence of Truth in Savings since its original introduction in 1968. Bonfanti, *supra* note 49, at 12. The Truth in Savings Act that was finally passed in 1991 has as its major provisions the following:

(1) *Required Disclosure.* The statute mandates that each advertisement, announcement, or solicitation made by any depository institution that mentions a specific rate of interest payable on an account state in a clear and conspicuous manner: (a) annual percentage yield (APY) in greater prominence than any other rate, (b) the period during which such APY is in effect, (c) all minimum balance and time requirements to earn the advertised rate of interest, (d) any initial deposit requirements, (e) a statement that regular fees or other conditions could reduce the yield, if applicable, and (f) a statement that an interest penalty is required for early withdrawal. Truth in Savings Act, § 263, 12 U.S.C. § 4303 (Supp. V 1993).

(2) *Regulation of Advertising.* The statute directs the Federal Reserve Board to promulgate regulations consistent with the law prohibiting misleading or inaccurate advertisements and restricting the use of terms "free" or "no-cost." *Id.* § 263(c), (d), 12 U.S.C. § 4303(c), (d). The Federal Reserve Board was also empowered to exempt by regulation communications made by radio, TV, or on billboards. *Id.*

(3) *Account Schedule.* The statute requires each depository institution to maintain a schedule of fees, charges, interest rates and terms, and conditions applicable to each class of accounts offered by the depository institution. *Id.* § 264, 12 U.S.C. § 4304. Disclosure must be in plain English and include, among other things, the following items: (a) a description of all fees, charges and penalties, (b) minimum balance requirements that affect fees and description of how minimum balance is determined, (c) the minimum initial deposit, (d) APY, (e) the period during which APY will be in effect, (f) the annual rate of simple interest, (g) the frequency with which interest is compounded and credited, (h) a clear description of the method used to determine the balance on which interest is paid, (i) minimum balance requirements, (j) minimum time requirements, (k) a statement, if applicable, that interest that has accrued to an account but has not been credited at the time of withdrawal will not be paid or credited to the account, (l) any provision or requirement relating to the nonpayment of interest, including penalties for early withdrawal, and (m) "other information" as per Federal Reserve Regulations, including frequency of rate adjustments and renewal policies on time deposits. *Id.*

(4) *Disclosure Requirement for Certain Accounts.* The law further provides that the Federal Reserve Board shall promulgate regulations to modify the disclosure requirements of the Act with regard to: (a) accounts with APY guaranteed for less than a year, (b) variable rate accounts, (c) accounts which, pursuant to law, do not guarantee payment at a stated rate, (d) multiple rate accounts, and (e) accounts with respect to which determination of annual percentage yield is based on an annual rate of interest that is guaranteed for a stated term. *Id.* § 265, 12 U.S.C. § 4305.

(5) *Distribution of Schedules.* The statute requires that notices be mailed to account holders within 180 days after promulgation of the regulations, informing the account holders of their right to receive an account schedule upon request. *Id.* § 266, 12 U.S.C. § 4306. Otherwise, schedules shall be made available in the following manner: (a) to any person, upon request, (b) to a potential customer before the account is opened, (c) in the case of any time deposit that is renewable at maturity without notice from the depositor, at least 30 days before the date of maturity, (d) within 10 days after the opening of an account, if the account is not opened in person, and (e) to all depositors affected by an adverse change in account terms within 30 days prior to any such adverse change. *Id.*

(6) *Payment of Interest.* The statute prohibits the "investable balance" method of interest calculation and requires that interest be paid on the entire amount of principal in the account. *Id.* § 267, 12 U.S.C. § 4307. The Act does not prohibit any particular method of compounding or crediting interest, although it requires that interest begin to accrue not later than the date the funds become available as required by the Expedited Funds Availability Act (Regulation CC). *Id.*

appears to address the issues identified in the hearings. Closer analysis, however, shows that the legislative action either added nothing to the existing law or provided ineffective solutions.

1. Misleading and Deceptive Advertising

The statute clearly appears to address the issue of misleading or deceptive advertising in connection with deposit accounts. It specifically prohibits misleading or inaccurate advertisements and restricts the use of terms "free" or "no-cost."⁵⁶ While the statute appears to address the problem, however, that perception is incorrect. Federal banking regulations enacted before Truth in Savings had already prohibited misleading or inaccurate advertisement of deposit accounts.⁵⁷ As a result, the provisions of Truth in Savings devoted to this problem were redundant with existing regulations. The statute, in fact, added nothing except, perhaps, a clear message from Congress to the banking regulators that Congress expected more results from the regulators on the topic of account advertising.⁵⁸

Not only did Truth in Savings do little, if anything, to strengthen deposit account advertising regulation, it also failed to provide any new protection to unsophisticated savers against unfair advertising practices of financial services providers other than banks. Truth in

(7) *Periodic Statements.* The statute requires that periodic statements contain conspicuous statements showing the annual percentage yield earned, the amount of interest earned, the amount of any fees charged and the number of days in the reporting period. *Id.* § 268, 12 U.S.C. § 4308.

(8) *Administrative Enforcement.* The law provides for enforcement of the Act by the primary regulator of the various types of depository institutions. *Id.* § 270, 12 U.S.C. § 4310.

(9) *Civil Liability.* Finally, Truth in Savings establishes a cause of action for bank customers and limits liability of banks. *Id.* § 271, 12 U.S.C. § 4311. This section makes banks liable to private plaintiffs for actual damages suffered by the plaintiff, plus an additional amount between \$100 and \$1,000. *Id.* The law provides ground rules for class actions, limiting the total recovery thereunder to the lesser of \$500,000 or 1% of the net worth of the depository institution, but also providing for reasonable attorney's fees. *Id.* Under the law, banks are permitted to raise defenses based on "bona fide errors" and "good faith reliance" on Federal Reserve Board rulings. *Id.*

56. *Id.* § 263(c), 12 U.S.C. § 4303(c).

57. *See supra* note 41.

58. The idea of sending a message to the regulators by introducing legislation in Congress was on the minds of at least some congressional representatives. Representative Annunzio, an early sponsor of Truth in Savings, has stated:

In a previous Congress I introduced my own version of Truth in Savings but did not push for its passage because I had hoped that the regulatory agencies would deal with the problem on their own. Unfortunately, the regulatory agencies have not acted in this area. . . . I cannot wait any longer for the agencies to act.

Services Disclosure Bill Reflects View There is Still Unfairness to Consumers, AM. BANKER, Mar. 29, 1979, at 4.

Savings did not broaden the coverage of the advertising regulatory scheme to include investment products outside of bank deposits. Witnesses during the hearings on the bill had suggested that if the law was needed to protect unsophisticated savers and investors from unwittingly getting into disadvantageous transactions, it should cover all such transactions regardless of whether the financial services provider was a bank, a thrift, a mutual fund, or an insurance company.⁵⁹ Truth in Savings, however, does not reach that goal. Although money market mutual funds⁶⁰ and insurance annuity contracts⁶¹ serve as close substitutes for bank deposit accounts, these products are not covered by Truth in Savings. Even deposit-like products offered by banks, such as mutual funds and repurchase agreements,⁶² do not come under the law's coverage. Therefore, while Truth in Savings appears to address deceptive advertising issues, it adds nothing to the existing regulatory scheme and falls short of the larger goal of protecting unsophisticated investors from unscrupulous investment and savings advertising.

59. See 1991 Hearings, *supra* note 53, at 27-38 (statement of Consumer Bankers Association), 39-50 (statement of Russell Dunman, Senior Vice President, First Alabama Bank, on behalf of the American Bankers Association).

60. A mutual fund is a pool of investors who invest in securities indirectly by purchasing shares in an "investment company" regulated by the Investment Company Act of 1940. The investment company (mutual fund), in turn, invests the shareholders' money in securities in accordance with an investment policy articulated in a prospectus covering the mutual fund shares. Like deposit accounts, "open end" mutual funds provide investors with a high level of liquidity by standing ready to redeem shares in the fund on demand. Mutual funds may invest in a range of underlying securities, including relatively safe investments such as short-term government securities or money market instruments. The combination of relative safety and liquidity make mutual funds a close substitute for bank deposit accounts in the minds of many customers. For an overview of mutual funds, see GEORGE G. KAUFMAN, *THE U.S. FINANCIAL SYSTEM: MONEY, MARKETS AND INSTITUTIONS* 245-49 (4th ed. 1989).

61. Annuities are technically insurance products, but they can provide a vehicle for long-term savings. See *THE WALL STREET JOURNAL GUIDE TO UNDERSTANDING PERSONAL FINANCE* 98-99 (Kenneth M. Morris & Alan M. Siegel eds., 1992). Typically, an investor makes a single payment or a series of payments in exchange for an annuity contract that guarantees the payment of a future income stream. See *id.* at 99. Annuities often figure in retirement planning strategies because of their tax-advantaged treatment. See *id.* at 89.

62. A repurchase agreement, or "repo," is a form of a short-term secured loan, where the borrower "sells" a security, typically an obligation of the U.S. treasury, to the lender and, at the same time, the borrower agrees to repurchase the security at a given time and price from the seller. The difference in the prices represents the interest on the loan. The lender is protected from the borrower's failure to repurchase the security by having title to the security and therefore the ability to sell the security on the secondary market. Although repurchase agreements once were employed primarily as a method for banks to lend money to each other for short periods of time, today many banks make these arrangements available to deposit customers, especially those customers whose deposit accounts exceed the deposit insurance limit. Steve Cocheo, *Municipal Deposits: "Yes," "No," and "Maybe,"* ABA BANKING J., Apr. 1992, at 22; *Banks Weigh the Costs of Deposit Insurance,* ABA BANKING J., Sept. 1991, at 45; *Old Tool Brings New Bucks to Oregon Bank,* ABA BANKING J., June 1991, at 7.

2. The Bank-Customer Relationship

The statute appears to address the imbalance of power between banks and their customers by mandating comprehensive disclosure of deposit account terms.⁶³ At least intuitively, requiring disclosure of key terms is an attractive way to "level the playing field" between the bank and its customer.⁶⁴ On closer inspection, however, the disclosure approach in the Truth in Savings context may not only fail to provide an advantage to consumers, but may actually put them at a disadvantage.

Truth in Savings requires disclosure of a great deal of information,⁶⁵ apparently on the assumption that the consumer receiving the information possesses the ability to process it in a meaningful way.⁶⁶ Truth in Savings, however, does not concern itself with whether a bank customer can appreciate the differences between deposit accounts based on the information provided.⁶⁷ Experience with other disclosure statutes tells us that consumers often are not capable of assessing the significance of the information disclosed.⁶⁸ By requiring

63. Truth in Savings Act, § 263, 12 U.S.C. § 4303 (Supp. V 1993).

64. Disclosure frequently has been employed as a method of relatively unobtrusive regulation that respects the autonomy of the parties to the underlying transaction by refraining from direct commands to producers to behave in a particular way and by allowing individuals in the marketplace to choose their own course of action after being informed of relevant information through the disclosure process. Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 579 (1979).

65. See *supra* note 55. The disclosure of this type has been characterized as "hypertechnical trivia" by one banking industry observer. Jo Ann S. Barefoot, *How Consumer Regs Can Work Against Consumers*, ABA BANKING J., Apr. 1993, at 26.

66. The underlying assumption of disclosure statutes is that consumers act as rational wealth-maximizers and will use the information supplied by disclosure statutes to shop around to get the best deal. See William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1113-14 (1984). Empirical studies have tended to show, however, that consumers do not actually behave that way. *Id.* at 1114-15.

67. Although Truth in Savings was designed to facilitate comparison shopping by requiring that all deposits accounts disclose the annual percentage yield (APY), some factors that do not enter into the APY calculation, such as minimum balances, fees, and interest penalties, nevertheless affect the economic attractiveness of the account. The Truth in Lending Act suffers from similar shortcomings. Under that statute, comparison shopping for consumer credit is facilitated by requiring creditors to disclose the annual percentage rate (APR). Depending on the type of loan, however, the regulations prescribe different methods of calculating APR. In addition, some costs of lending are not reflected in the APR, such as real estate related fees, late payment fees, and other costs. For a description of the problems under the Truth in Lending Act, see Griffith L. Garwood et al., *Consumer Disclosure in the 1990s*, 9 GA. ST. U. L. REV. 777, 786 (1993).

68. Ironically, the disclosure of information often makes the decisionmaking process less effective for consumers. Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 27-30. Consumers often make poor choices when

banks to disclose technical information that the typical consumer cannot use, therefore, the disclosure method of consumer protection tends to defeat itself.⁶⁹

Although some studies suggest that required disclosures have some beneficial effect on the level of consumer knowledge,⁷⁰ other studies⁷¹ and anecdotal evidence⁷² suggest that required consumer disclosures impose considerable costs with little concomitant benefit. Our collective faith in the value of disclosure to "level the playing field" between sophisticated banks and their unsophisticated customers should be re-examined in light of a recent survey by the Educational Testing Service and the Department of Education. This survey showed that almost half of all Americans over age sixteen lack basic reading and math skills.⁷³ These findings suggest that account disclosure may have little meaning for the very people it has been designed to protect.

they are overcome by "information overload." *Id.* at 27-28. The oversupply of information may itself become a barrier to the information acquisition process. Melvin Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309-10 (1986).

69. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 690-91 (1985); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 424-25 (1990).

70. Many studies carried out in connection with the Truth in Lending Act suggest that the law made consumers more aware of the annual percentage rate and costs of credit. *See, e.g.*, William K. Brandt & George S. Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J.L. REF. 297, 302-03 (1974); Eskridge, *supra* note 66, at 1163.

71. Some researchers have concluded that the information made available by the Truth in Lending Act did not in fact promote comparison shopping for credit. Rather, researchers found that comparison shopping for financial services remained limited to the relatively sophisticated consumers who would have been able to comparison shop even without the law's information requirements. *See, e.g.*, Joseph O. Eagan et al., *The Impact of Truth-in-Lending on Automobile Financing — An Empirical Study*, 4 U.C. DAVIS L. REV. 179, 194 (1979).

72. Bankers complain that required disclosures do not have any real effect on customer behavior. In the words of David K. Smith, senior vice president, Union State Bank, Arkansas City, Kansas: "I see so many of the other regulatory disclosures we are required to give them in lobby trash cans or worse yet, blowing down the street in the Kansas wind." Steve Cocheo, *Savings Reg Yields Banker Distress*, ABA BANKING J., Aug. 1992, at 10.

73. The study tested more than 26,000 Americans on practical, everyday matters such as reading newspaper articles and bus schedules, filling in simple business forms like bank-deposit slips, and answering questions involving basic math skills. IRWIN S. KIRSCH ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, ADULT LITERACY IN AMERICA xii-xv (1993). The test's questions were categorized into five levels of difficulty. *Id.* at xiv-xv. Extrapolating from the test results, approximately 40 to 44 million Americans perform at the lowest level, meaning they are unable to calculate the total of a purchase, determine the difference in price between two items, read a street map, or enter information on a simple form. *See id.* It also indicates that an additional 50 million perform at the second-lowest level: they are unable to answer specific questions about facts in a newspaper article or to interpret charts summarizing information. *Id.* at xv. With regard to the rest of the difficulty levels, the test found that 61 million Americans function with middle-level skills,

A great irony of Truth in Savings is that it presents customers with information they cannot use, while at the same time creating a possible safe harbor for banks to gain protection from customer claims. The 1985 decision of *Perdue v. Crocker National Bank* put banks on notice that business dealings with customers had to meet minimum standards of fairness.⁷⁴ Although the standard was not statutorily defined, it nevertheless modified bankers' behavior. In the post-*Perdue* world, banks understood that they could be subject to potential liability under state banking regulations, consumer protection laws, unfair trade practices, common law fraud, unconscionability, or any number of other state-law-based legal theories.⁷⁵

The passage of Truth in Savings may make state courts reluctant to follow the *Perdue* line of cases to address the imbalance of power between banks and their customers. The *Perdue* court expressly determined that California law governed the bank-depositor relationship because the court found no federal preemption of the subject.⁷⁶ In light of changes in the federal law since *Perdue* was decided, however, a court reviewing the issue today might not reach the same conclusion.⁷⁷

Even if not preempted by federal law, courts may be reluctant to entertain *Perdue*-type claims in light of the fact that consumers were fully informed of the terms of the account relationship at the time the

30 million function at the next level, and up to 8 million function at the highest level. *Id.* at 50.

74. See *supra* notes 44-48 and accompanying text.

75. See Alsup & Lincoln, *supra* note 48; Finnegan, *supra* note 48; Loftis, *supra* note 48.

76. *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 516-25 (Cal. 1985), *appeal dismissed*, 475 U.S. 1001 (1986).

77. Since 1985, when *Perdue* was decided, federal law has taken a larger role in the legal relationship between banks and their depositors. In 1986, Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), which expanded the scope of the Bank Secrecy Act. In 1987, the Expedited Funds Availability Act, 12 U.S.C. §§ 248a, 4001-4010 (1988 & Supp. IV 1992), became law, which was followed closely by the expansion of Regulation J, 12 C.F.R. § 210 (1994), dealing with the check-collection process. In 1991, Truth in Savings appeared. These laws, together with the federal laws regulating deposits that were in place at the time *Perdue* was decided, such as the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (1988 & Supp. IV 1992), the Right to Financial Privacy Act, 12 U.S.C. § 3401-3422 (1988 & Supp. IV 1992), Regulation D reserve requirements, 12 C.F.R. § 204 (1994), and the Federal Deposit Insurance Act, 12 U.S.C. §§ 264, 1728, 1811-1831 (1988 & Supp. IV 1992) (which was also strengthened in 1991), could be seen as so thoroughly occupying the legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). It would appear from the *Cipollone* case, however, that the preemption clauses (if any) of each act would control and that matters outside the scope of the explicit preemption clauses would be within the province of the state to regulate if not implicitly preempted. Not all of the federal laws touching on the deposit relationship have preemption provisions, however, so the implied preemption question remains an open issue.

account was opened.⁷⁸ Courts might view Truth in Savings's comprehensive disclosure requirements as the measure of protection accorded depositors and limit review of account relationships to compliance with these requirements.⁷⁹ Truth in Savings, therefore, might in effect provide a "safe harbor" for banks regarding the amount and type of disclosure required in the deposit account context, thereby precluding consumers from making *Perdue*-type claims.

While the creation of a safe harbor may take away some causes of action, customers nevertheless can sue for failure to comply with Truth in Savings. The statute explicitly provides for a civil cause of action. Unfortunately for customers, however, the civil liability provision does not pose much of a threat to banks.⁸⁰ Given the weakness of this provision, the law will be enforced primarily through its administrative enforcement section.⁸¹ Because the primary federal banking regulators have gone on record as being opposed to the idea of Truth in Savings,⁸² one might expect the banking regulators to be less than enthusiastic about enforcing strict compliance with the law. In addition, the violations are not the type that would affect the "safety and

78. After *Perdue* was decided, some commentators suggested that full disclosure of account terms was the best defense against *Perdue*-type claims. See Alsup & Lincoln, *supra* note 48, at 900 ("In virtually all states, a seller who made full disclosure up front would be immune from unconscionability suits. This is not necessarily true under *Perdue*, although full disclosure is a powerful consideration and one which, as a practical matter, will discourage almost all suits."). With Truth in Savings mandating disclosure, it may have the effect of precluding *Perdue*-type suits.

79. Certainly, states adopting the view that adhesion contracts will be enforced consistent with the reasonable expectations of the parties will have a difficult time overcoming the "unfair surprise" requirement of that doctrine after Truth in Savings. The account disclosure required by the law should create the reasonable expectation in the mind of the account customer of what the terms of the relationship will be. Finnegan, *supra* note 48, at 1000-03.

80. The law caps the maximum penalty for a violation at \$1,000 per individual action, or, in a class action, the lesser of \$500,000 or 1% of the net worth of the depository institution involved. Truth in Savings Act, § 271, 12 U.S.C. § 4311 (Supp. V 1993). In addition, the law allows banks defenses for "bona fide errors" and for reliance on Federal Reserve Board rulings. *Id.* § 271(c), (f), 12 U.S.C. § 4311(c), (f). The combination of these factors results in a civil liability section that does not impose much of a threat to banks and, combined with the one-year statute of limitations, *id.* § 271(e), 12 U.S.C. § 4311(e), makes banks' exposure under this proposed law very limited.

81. *Id.* § 270, 12 U.S.C. § 4300.

82. See, e.g., 1991 Hearings, *supra* note 53, at 56-67 (statement of the Board of Governors of the Federal Reserve Board); HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, TOGETHER WITH ADDITIONAL, SUPPLEMENTAL, MINORITY AND DISSENTING VIEWS, DEPOSITORY INSTITUTIONS ACT OF 1988: REPORT TO ACCOMPANY H.R. 5094, H.R. DOC. NO. 822, 100th Cong., 2d Sess., pt. 1, at 384, 399, 406-08 (1988) [hereinafter H.R. 5094 REPORT], reprinted in Fed. Banking L. Rep. (CCH) No. 1245, at 384, 399, 406-08 (Aug. 12, 1988) (statements of the Federal Reserve Board, Comptroller of the Currency, and Federal Deposit Insurance Corporation, respectively).

soundness" of a financial institution,⁸³ so the regulators might not be willing or able to use all of the administrative sanctions at their disposal⁸⁴ to force banks to comply.⁸⁵

Therefore, the statute's attempt to solve the problem of the imbalance of power between banks and their customers by bombarding customers with a great deal of information will likely be ineffective. The disclosure requirement may not only be ineffective protection for consumers, it may be a boon for bankers if it creates a safe harbor for banks by foreclosing *Perdue*-type claims. In any event, neither the statute's limited private right of action nor the administrative remedy pose a serious threat to banks. The attempt to equalize the relationship between banks and their customers through this legislation, therefore, also appears to fall short of the mark.

3. Method of Interest Calculation

Truth in Savings also addresses the problem raised during the hearings that banks sometimes employ unfair methods of interest calculation. The statute prohibits the use of the "investable balance" method of calculating interest.⁸⁶ If the problem identified during the hearings consisted only of the use of the investable balance method of

83. Generally speaking, an unsafe or unsound practice embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk of loss or damage to an institution, its shareholders, or the insurance fund administered by the corporation.

Overdrafts and Correspondent Banking Practices: Hearings Before the Sen. Comm. on Banking, Housing, and Urban Affairs, 95th Cong., 1st Sess. 50 (1977) (statement of George LeMaistre, Chairman, Federal Deposit Insurance Corporation), *quoted in* EDWARD L. SYMONS, JR. & JAMES J. WHITE, *BANKING LAW* 554 (3d ed. 1991).

84. The banking regulators have an array of sanctions available to use against financial institutions and institution-affiliated parties, ranging from cease-and-desist orders through civil money penalties to criminal prosecutions. *See* 12 U.S.C. § 1818(b), (i), (j) (1988).

85. *First Nat'l Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674 (5th Cir. 1983); *Gulf Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982). In *Gulf*, the court noted that an "unsafe or unsound" practice must threaten the financial integrity of the institution before a cease-and-desist order may issue. *Id.* at 264. In a footnote, the court left open whether a cease-and-desist order based on a violation of law must meet the same standard: "The 'violation of law' provision . . . may be subject to the same limits as the 'unsafe or unsound practice' provision discussed . . . above. If so, the cease and desist power would arise only when an association violates a law which protects the association's financial integrity." *Id.* at 265 n.5; *cf. Saratoga Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 879 F.2d 689, 693 (9th Cir. 1989) (finding that a specific violation of a law or regulation would not have to affect the stability of the institution or create a risk for the deposit insurance fund as long as "the underlying regulation [being violated] has the financial stability of the bank as its purpose"). Because the official finding of Truth in Savings lists "stability" as one of the purposes for the law, the cease-and-desist power would presumably be available to enforce the law under the *Saratoga* test.

86. Truth in Savings Act, § 267, 12 U.S.C. § 4307 (Supp. V 1993).

interest calculation, the statute clearly addresses that problem. On the other hand, if the problem identified extends beyond a particular method of interest calculation—to unfair methods of interest calculation generally—the statute does not fully address the problem. The statute prescribes no particular method of interest calculation and does not articulate a standard of fairness that interest calculation methods must meet.⁸⁷ Given bankers' ingenuity, they almost certainly can devise new unfair methods of interest calculation for which Truth in Savings will offer no remedy.

C. *The Failure of Legislative Methodology*

As the previous section illustrates, determining the effectiveness of the legislative action in light of the problems identified during the committee and subcommittee hearings presents a difficult challenge. Deceptive advertising by banks, the unfair nature of the relationship between banks and their customers, and unfair methods of calculating interest seem like specific problems for which the proposed legislation provided a solution. On closer examination, however, these "problems" really are quite broad issues, rather than specific problems. For example, while the hearings produced some degree of consensus that deceptive advertising was a matter of concern,⁸⁸ the apparent consensus did not constitute a rigorous definition of the problem because the witnesses spoke with more than one voice. While some witnesses focused on the advertising practices of banks, others focused on the advertising practices of other financial services providers.⁸⁹ Therefore, even though most witnesses concurred in

87. An alternative Truth in Savings proposal considered during the 101st Congress, H.R. 6, did contain a provision mandating a standard method of interest calculation. H.R. 6, § 1109(a), 102d Cong., 1st Sess. (1991). That approach was rejected in the mark-up of the competing Truth in Savings bills, H.R. 6 and H.R. 447, that were eventually reported out of committee as H.R. 2654. Some witnesses saw the omission as a major mistake that would prevent the Truth in Savings law from achieving the purpose of preventing unfair methods of interest calculation. See *1991 Hearings*, *supra* note 53, at 52-54 (testimony of Edmund Mierwinski). Other witnesses thought prescribing a method of calculating interest would go beyond the scope of the legislation's disclosure purpose. See *id.* at 62 (statement submitted by the Board of Governors of the Federal Reserve System). Once again, the testimony reveals that the hearings process did not identify a specific problem to be solved.

88. All of the pro-consumer witnesses and at least one thrift banker believed that advertising was out of hand. *1984 Hearings*, *supra* note 17, *passim*.

89. The banking industry repeatedly insisted that the mutual fund industry should be covered by Truth in Savings, as well. See, e.g., *Truth-in-Savings Act — H.R. 736: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 8-10 (1989) [hereinafter *1989 Hearings*] (statement of Joe Belew, President, Consumer Bankers Association, accompanied by Russell Dunman, First Alabama Bank, representing American Bankers Association).

identifying this particular issue, they did not concur in defining the specific problem.

Similarly, some testimony noted the disparity in power and knowledge between banks and their customers.⁹⁰ The hearings, however, did not consider whether the imbalance in the bank-customer relationship was a problem in and of itself or whether it was merely symptomatic of the larger problem that customers do not possess enough sophistication to deal with banks.⁹¹ The latter problem suggests a different set of solutions than the former. The former problem assumes the capacity on the part of the customer to stand up to the bank if given the appropriate information; the latter suggests that even with the information, the customer will be at a disadvantage.

Identifying the problem makes an important difference in the selection of an appropriate solution, but what the problem is depends on the perspective of the problem framer. Both consumer and bank lobbyists perceived the bank-customer relationship to be a problem, but the problems they each saw were very different. Consumer groups focused on the disparity in bargaining power between banks and their customers, and at least some testimony before Congress suggested that Truth in Savings should correct that imbalance.⁹² Banks, for their part, recognized a problem in the bank-customer relationship in that they feared customers would subject them to *Perdue*-type claims.⁹³ The congressional testimony, however, never clearly articulated to what extent the imbalance of power was to be addressed by Truth in Savings or how it should be resolved.

Finally, proponents raised concerns about the methods used by banks to calculate interest on accounts.⁹⁴ From the testimony, however, one cannot determine whether the "problem" identified was merely the use of the "investable balance" method of interest calculation or a broader concern with such practices as calculating interest on a 360-day year.⁹⁵ Some witnesses believed that any regulation of

90. See, e.g., 1984 Hearings, *supra* note 17, at 52-57 (statement of Mark Hannaford, President, Bankcard Holders of America).

91. Lack of consumer sophistication often serves as the foundational premise for consumer protection laws. See Sovern, *supra* note 68, at 25.

92. See 1989 Hearings, *supra* note 89, at 104-12 (testimony of Consumers Union and Consumer Federation of America).

93. See, e.g., Alsup & Lincoln, *supra* note 48; Finnegan, *supra* note 48; Lofts, *supra* note 48.

94. See *supra* notes 49-53 and accompanying text.

95. 1984 Hearings, *supra* note 17, at 59 (statement of Richard L.D. Morse). The survey prepared by the Consumer Federation of America noted the lack of standard terminology and the bewildering array of interest-rate calculation methods. See CFA Study, *supra* note 52. Although the investable balance method received the most attention during the hearings, these other methods were arguably before the committee as well. *Id.*

the substantive terms of the interest calculation was beyond the law's purported scope.⁹⁶ Like the other identified areas of concern, the "problem" of interest rate calculation methods was really an "issue" that needed further definition. The legislative process, however, never focused the issue with the degree of specificity necessary to determine exactly what the problem was.

D. Unintended Consequences of the Legislative Response

Because we can never know the real problem at which Truth in Savings was aimed, we will never know for certain whether the law will achieve the ends sought by its proponents. The effectiveness of the law must be judged in terms of the problems it sought to correct, but the existing problem-definition process stops far short of rigorously defining exactly what the legislation was supposed to achieve. While failure to identify the problems may make evaluating the legislative response difficult, it may also give rise to unintended consequences.

1. Costs of the Legislation

Without rigorously defining what the statute aims to achieve, the law might have the unintended consequence of imposing a greater cost on society than the benefit it returns. Truth in Savings saddles banks with substantial compliance costs.⁹⁷ Although banks will pass along the cost to their customers in the form of higher fees and lower interest rates,⁹⁸ the added compliance costs will nevertheless hurt the banking industry.

96. 1991 Hearings, *supra* note 53, at 62 (statement submitted by the Board of Governors of the Federal Reserve System).

97. Truth in Savings compliance involves retaining professionals for assistance, such as attorneys to review the regulations, training professionals to educate the workforce, computer programmers, et cetera. Phil Roosevelt, *Banks Scramble to Meet Truth in Savings Deadline*, BANKING WK., Jan. 11, 1993, at 10. In addition, compliance entails the production of complicated documents that require staff time, training of bank personnel, printing costs, review of marketing plans, and the adjustment of complicated computer programs to facilitate data provision. *Truth in Savings Nears. Are You Ready?*, ABA BANKING J., Sept. 1992, at 36-38. The costs of compliance are especially high for small banks. Bill Atkinson, *Small Banks, Big Compliance Load*, BANKING WK., Feb. 1, 1993, at 1. For example, Metcalf Savings Bank of Overland Park, Kansas, a \$120-million institution, spent \$30,386 in Truth in Savings compliance costs. Beth Piskora, *Metcalf Savings Howls Over Cost of Truth In Savings*, BANKING WK., Aug. 9, 1993, at 1. The bank's entire operating budget for 1993 totaled only \$172,500. *Id.*

98. Commenting on the compliance costs imposed by Truth in Savings, John Brittain, vice president of retail deposit product management at Meridian Bancorp, Reading, Pa., said: "[It] will be made up in slightly lower interest rates and slightly higher fees." Barbara A. Rehm, *Moment of Truth-in-Savings Arrives, and Banks Wince*, BANKING WK., June 28, 1993, at 10.

The federal banking regulation burden imposes considerable costs on the banking industry, placed by one estimate at fifty-nine percent of profits.⁹⁹ The costs imposed by Truth in Savings compliance make bank deposit products more expensive relative to similar products available through mutual funds and insurance companies. In the aggregate, these additional costs create an incentive for depositors to move their money out of banks and into mutual funds.¹⁰⁰ The disintermediation to which high compliance costs contribute runs directly counter to the overall goals of banking regulation.¹⁰¹

99. Barbara A. Rehm, *Compliance Cost Put at 59% of Profits*, BANKING WK., June 22, 1992, at 10. The cost of regulatory compliance has long been a rallying cry of the banking industry against further regulatory mandates. See, e.g., Patrick Dalton, *Red Tape Maze Hinders Credit*, ABA Tells House Subcommittee, ABA BANKERS WKLY., Aug. 11, 1992, at 6. The banking industry has found some support for their position on Capitol Hill among some congressional representatives who have proposed legislation to reduce the crush of federal banking regulatory paperwork, especially for small banks. See Patrick Dalton, *Bereuter Introduces Bill to Ease Compliance Burden*, ABA BANKERS WKLY., June 30, 1992, at 6; Patrick Dalton, *Senator Places Burden in the Record*, ABA BANKERS WKLY., May 26, 1992, at 7. In the 102d Congress, as of mid-summer 1993, four bills dealing with regulatory relief—H.R. 59 (Rep. Bereuter, R-Neb., sponsor), H.R. 269 (Rep. Bill McCollum, R-Fla., sponsor), S. 265 (Sen. Richard Shelby, D-Ala., sponsor), and S. 1124 (Sen. Alfonse D'Amato, R-N.Y., sponsor)—were under consideration. The industry also has found support among the banking regulatory agencies, see Claudia Cummins, *Regulations Too Costly, Agencies Tell Lawmakers*, BANKING WK., Dec. 21, 1992, at 1, and especially one member of the Board of Governors of the Federal Reserve System, John P. LaWare, a former commercial banker, see John Ginovsky, *Governor LaWare Feels Pain Of Overregulated Industry*, ABA BANKERS WKLY., June 2, 1992, at 8.

Governor LaWare has spoken out on many occasions concerning the burden that compliance costs impose on the banking industry. See, e.g., *Simplifying the Regulatory Burden on Well-Run Financial Institutions: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 2d Sess. 65, 66-79 (1992) (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve Board), reprinted in 78 FED. RES. BULL. 607, 607-12 (1992). While many industry observers believe the cost of the regulatory burden to be substantial, the exact cost of regulatory compliance remains undefined. See Barbara A. Rehm, *Compliance Price Tag: \$3 Billion*, BANKING WK., June 15, 1992, at 1. But see Steve Klinkerman, *Banks Accused of Inflating Compliance Cost Estimates*, BANKING WK., Apr. 12, 1992, at 10.

100. Banks suffer from a structural handicap when competing against mutual funds on yield alone, because the costs of doing business as a bank are higher than the costs of doing business as a mutual fund, especially if one takes into account the cost of deposit insurance premiums, reserve requirements, and compliance with social policy legislation such as the Community Reinvestment Act. See Randall Smith, *Banks Could be Pinched for Deposits to Lend After Consumer Exodus*, WALL ST. J., June 30, 1993, at C1.

101. *The Credit Crunch and Regulatory Burdens in Bank Lending: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 103d Cong., 1st Sess. 118, 124-26 (1993) (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve Board, and Chairman, Federal Financial Institutions Examination Council), reprinted in 79 FED. RES. BULL. 466, 468 (1993). The flight of funds from bank accounts into mutual funds has caused some concern among economists, who fear that with fewer financial assets in the hands of banks, the Federal Reserve will have a much more difficult time controlling the money supply and responding

2. Reduction in Variety of Financial Products

If the market for deposit account products behaves in the same way as the markets for other products subject to comprehensive disclosure requirements, another unintended consequence of the statute will be to reduce the types of financial products that banks offer to consumers.¹⁰² Experience has shown that when a previously unregulated area becomes subject to regulation, the products offered become relatively standardized and innovation in the marketplace diminishes.¹⁰³

3. Promotion of Interstate Banking

Truth in Savings likely will have the effect of promoting interstate banking. Prior to the enactment of Truth in Savings, regulation of deposit disclosures varied significantly from one state to the next.¹⁰⁴ Although the banking lobby had hoped for a stronger preemption

to short-term volatility in the economy. Phillip R. Mack, *Recent Trends in the Mutual Fund Industry*, 79 FED. RES. BULL. 1001, 1011-12 (1993). In addition, as banks lose deposit accounts they have less cash available to lend to borrowers. The flight of money from banks could cause another credit crunch for small businesses, who rely on banks much more than larger businesses do to raise money. Kenneth H. Bacon, *Bank's Declining Role in Economy Worries Fed, May Hurt Firms*, WALL ST. J., July 9, 1993, at A1.

102. 1991 Hearings, *supra* note 53, at 58 (statement submitted by the Board of Governors of the Federal Reserve System: "[W]e have learned that rules that are not intended to affect the variety of products offered nonetheless may have the practical effect of standardizing products and reducing the options available to customers").

103. FFIEC Study on Regulatory Burden: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs, 103d Cong., 1st Sess. 28, 33-34 (1993) (statement of John P. LaWare, Chairman, Federal Financial Institutions Examination Council, and Member, Board of Governors of the Federal Reserve Board), reprinted in 79 FED. RES. BULL. 281, 283 (1993).

The current approach to regulation, which often relies on mandates and uniform standards, has led to inflexibility, which can be costly. Very specific requirements necessarily bring standardization . . . such inflexibility can be costly because it tends to preclude new approaches, prevent innovation, and even limit access to new technology and new markets.

Id.

104. Prior to the enactment of Truth in Savings, several states had enacted their own versions of deposit account disclosure laws. State laws requiring disclosure of deposit account terms varied greatly. In general, the state law responses fit into four broad categories: (1) states with no explicit disclosure requirements; (2) states requiring that fees, rules, and regulations be posted in the banking lobby or offices, *see, e.g.*, ALASKA STAT. § 06.05.120 (1988 & Supp. 1993); WASH. REV. CODE ANN. § 30.20.060 (West 1986 & Supp. 1993); (3) states requiring that bank rules and regulations be printed in the passbooks evidencing the accounts or delivered to the customer, *see, e.g.*, GA. CODE ANN. § 7-1-350 (Michie 1989); HAW. REV. STAT. § 403-123 (1985); R.I. GEN. LAWS § 19-11-14 (1989); and (4) states imposing an affirmative duty of disclosure regarding the calculation and payment of interest, fees and charges, and advance notice of changes in these terms, *see, e.g.*, CAL. FIN. CODE, §§ 865-865.10 (West 1989) (repealed 1993); MASS. GEN. LAWS ANN. ch. 140E, § 2 (West 1991 & Supp. 1994); N.Y. BANKING LAW §§ 14[1], 14-c (McKinney 1990 & Supp. 1994). *See* Mary Jane Large, *Deposit Account Disclosure*, 37 BUS. LAW. 1317, 1319 (1982).

provision,¹⁰⁵ Truth in Savings nevertheless bestows a major benefit to institutions engaging in interstate banking. While the law does not explicitly preempt existing state statutes,¹⁰⁶ it does make compliance across state lines easier. This result obtains because the advent of federal legislation likely will prevent additional state statutes from coming into existence.

Complying with the federal law and a few special state laws (assuming that some state laws are not preempted completely by Truth in Savings) will be a much easier task for institutions engaged in interstate banking than complying with fifty different statutes on the same topic. In addition, some states are moving to repeal their deposit disclosure laws in light of Truth in Savings.¹⁰⁷ If one federal standard applies to require disclosures on deposit accounts rather than fifty different standards, compliance costs for interstate banks could be reduced, thereby making interstate banking marginally less expensive. The law's effect, therefore, may change the existing costs and benefits that define the competition between interstate and intrastate banks in favor of the interstate banks.

4. Aggravation of Compliance Cost Economies of Scale

The mere existence of a new regulation has ramifications for the banking market. New regulations create advantages for medium- to large-sized banks over their smaller competitors. The advantage comes from the economies of scale that medium- to large-sized banks enjoy in compliance costs.¹⁰⁸ Although studies of economies of scale

The lack of uniformity among states may have been due to existing federal regulations that already required a certain amount of disclosure, or merely to philosophical differences between the various states. The passage of Truth in Savings, however, squelches any state-level preferences and disregards the special kind of federalism that exists in the banking area. For a discussion of the rise of federal power in the demand deposit account context and its ramifications, see Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251 (1989). Although Truth in Savings does not necessarily preempt additional state laws on the topic, it certainly takes away a great deal of the incentive for states to act as "laboratories" in enacting new and innovative ways to deal with the perceived problems raised by Truth in Savings' proponents.

105. See 1991 Hearings, *supra* note 53, at 28-29 (testimony of the Consumer Bankers Association), 45 (statement of the American Bankers Association).

106. Truth in Savings Act, § 273, 12 U.S.C. § 4313 (Supp. V 1993).

107. Lynne B. Barr & Anne Wallace, *Deposit Account Developments: Truth in Savings*, 48 BUS. LAW. 1129, 1131 (1993).

108. The Board of Governors of the Federal Reserve System commissioned a report to determine whether banks enjoy economies of scale in compliance with consumer protection regulations. The study found modest economies of scale in compliance costs for institutions up to an optimal size of 375,000 consumer credit accounts. After that point, the researchers noted small diseconomies of scale. GREGORY E. ELLIEHAUSEN & ROBERT D. KURTZ, SCALE ECONOMIES IN COMPLIANCE COSTS FOR CONSUMER CREDIT

in the banking industry have reached somewhat different conclusions over the years, they quite consistently find that smaller banks have a higher cost of compliance per deposit account than do larger banks.¹⁰⁹ In 1989, of the approximately 13,500 banks in the United States, about 4,500 were small banks.¹¹⁰ Truth in Savings, therefore, puts those banks in an even more difficult competitive position.

5. Reduction of Competition for Deposits

Some proponents of Truth in Savings argued during the congressional hearings that the law would benefit the banking industry by setting ground rules under which accounts may be advertised.¹¹¹ By requiring all banks to adhere to the same fair disclosure requirements, the argument went, bankers would compete on the real terms of their products, rather than on hype.¹¹² While that proposition may be true, the law might also have the effect of dampening advertising for deposit accounts, which could result in reduced competition among banks. Bankers have an interest in preventing "advertising wars" that bid up the interest rates on deposit accounts, as the costs of runaway deposit competition could be crippling to the banking industry.¹¹³ In this way, the law could benefit the banking industry as a whole by keeping advertising within certain bounds, thereby reducing unfettered competition for deposit accounts and helping to keep the interest rates paid on deposit accounts at a manageable level.¹¹⁴

REGULATIONS: THE TRUTH IN LENDING AND EQUAL CREDIT OPPORTUNITY LAWS 10 (1985). While scale economies have been observed in the area of regulatory compliance, whether overall scales of economy exist eludes a definitive answer. Over the years, different studies have reached different conclusions. One study suggests that where scales of economy exist, they are not very significant. David B. Humphrey, *Cost Dispersion and the Measurement of Economies in Banking*, ECON. REV., May/June 1987, at 24 (published by the Federal Reserve Bank of Richmond). A more recent study found that economies of scale do exist, but that the optimum size for a bank may be smaller than previously supposed. George M. Bollenbacher, *America's Banking Dinosaurs*, WALL ST. J., Mar. 18, 1992, at A8.

109. ELLIEHAUSEN & KURTZ, *supra* note 108, at 6; Humphrey, *supra* note 108, at 32; Bollenbacher, *supra* note 108, at A8. How significant this difference in cost of compliance is remains an open question. See FRASER & KOLARI, *supra* note 39, at 128-31.

110. "Small" banks are defined as those institutions with less than \$25 million in assets. 1989 Hearings, *supra* note 89, at 6 (statement of Martha Seger, Governor, Federal Reserve Board).

111. As the representative of one savings and loan noted during the hearings on Truth in Savings, legislation that restricts the allegedly unfair practices of some banks benefits other banks in the marketplace by leveling the playing field. 1984 Hearings, *supra* note 17, at 16-17 (statement of Thomas G. Riley, Senior Vice President, Washington Federal Savings and Loan).

112. *See id.*

113. *See id.*

114. *See id.*

These unintended consequences¹¹⁵ and shortcomings of Truth in Savings directly result from the lack of a problem-solving methodology in the development of the legislation. The drafter's failure to adopt a problem-solving methodology led to the development of a statute with no clear purpose and a legislative response with no clear target. As a result, the law's effect may be to injure the very interest groups it was intended to protect.

E. *The Failure to Consider Alternatives*

The failure of the legislative process to identify specifically the problem to which Truth in Savings was addressed may be due, in part, to the fact that the bill was cast from the start as a disclosure statute. The bill's title, aspiring to "Truth," implies that the underlying problem was something dealing with false or misleading information. The legislation, therefore, invited other participants in the legislative process to assume a problem and not to examine rigorously the underlying issues.¹¹⁶ By linking the legislative solution to the problem from the start of the legislative process, the energies of legislators and lobbyists

115. This discussion has assumed that the intended purposes of Truth in Savings are to reduce deceptive advertising, level the playing field, and eliminate unfair interest calculation practices. One could argue, however, that the consequences that I have identified as "unintended" were in fact anticipated and planned for by the private interest groups that supported or opposed the legislation.

116. The links between the problem identified and its proposed solution are subtle and complex. Findings in the field of cognitive psychology show that people tend to organize their knowledge into related groups, and, once a problem is framed, the problem itself suggests the solution. See James F. Voss et al., *Individual Differences in the Solving of Social Science Problems*, in *INDIVIDUAL DIFFERENCES IN COGNITION* 205, 228 (Ronna F. Dillon & Ronald R. Schmeck eds., 1983) (finding that experts tend to spend more time defining the problem at hand, but once problem is identified, only one or two solution sets emerge); Judith Torney-Purta, *Cognitive Representations of the Political System in Adolescents: The Continuum from Pre-Novice to Expert*, in *THE DEVELOPMENT OF POLITICAL UNDERSTANDING: A NEW PERSPECTIVE* 11, 22-23 (Helen Haste & Judith Torney-Purta eds., 1992) (noting similar phenomenon to Voss et al., *supra*, that experts developed more sophisticated problem, which led to specific solutions); see also Farber, *supra* note 9, at 554-58 (expressing view that cognitive psychology supports the position that "practical reason" exists and provides the framework for how people do in fact make decisions); cf. Anthony Palasota, *Expertise and the Law: Some Recent Findings from the Cognitive Sciences About Complex Human Information Processing*, 16 T. MARSHALL L. REV. 599 (1991) (discussing cognitive psychology in the context of legal pedagogy); Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1292-1301 (1991) (discussing cognitive psychology in the context of the learning process).

The natural tendency to link the problem and the solution, however, may prevent the consideration of alternative solutions. The way a bill is characterized (for example, "Truth in —") by tradition and conditioning suggests a particular approach to the underlying problem (for example, a comprehensive disclosure statute). In the design of legislation as in the design of any other artifact, however, function does not dictate form. PETROSKI, *supra* note 13, at 174-75; Eugene S. Ferguson, *The Mind's Eye: Nonverbal Thought in Technology*, 197 SCIENCE 827 (1977). The legislative problem solver must be careful to

alike tended to focus on the solution proposed, rather than the problem to be corrected.¹¹⁷

The link between text and problem tends to develop a legislative response that does not necessarily address the underlying problems, but rather focuses on passage of the bill as the goal of the legislative process.¹¹⁸ In the case of Truth in Savings, the link between problem and solution prevented Congress from considering alternative legislative responses. As Professor Rubin commented in connection with the development of Truth in Lending, the many alternative solutions to the problem "were simply beyond the conceptual horizon of the drafters because there was no methodology for identifying the statute's goals and separately evaluating its techniques."¹¹⁹ If the issues presented by the proponents of Truth in Savings had been reduced to specific problems and separated from the language of a specific legislative proposal, the lawmakers could have given serious consideration to a number of options, including the following:

1. Defer to Regulators

Depending on what problem they decided the law was intended to address, the legislators could have concluded that the administrative agencies charged with regulating our nation's banks had the situation under control and deferred to their expertise.¹²⁰ Courts often defer to agency expertise,¹²¹ even though some commentators have questioned the value of the supposed independence and expertise of regulators.¹²² In some situations, congressional deference to agencies may be appropriate as well, especially in highly regulated areas where the

frame the problem completely yet flexibly in order to consider all workable solutions and not to exclude some inadvertently.

117. Rubin, *supra* note 1, at 295.

118. Sometimes the problem being corrected by Congress appears to be the mere absence of the proposed legislation. This view, however, does not comport with a problem-solving approach to legislation; rather, it suggests that the passage of the legislation itself, rather than the correction of an underlying problem, is the object of the legislative process. See Seidman, *supra* note 5, at 63 ("To state the absence of a proposed solution as a cause transforms problem-solving into an ends-means methodology.").

119. Rubin, *supra* note 1, at 289.

120. The federal banking regulators had already promulgated regulations dealing with some issues raised by the proponents of the Truth in Savings Act. See *supra* notes 41-43 and accompanying text.

121. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 Wis. L. Rev. 1275.

122. See, e.g., Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1402-09 (1975); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

responsibility for the development of a coherent regulatory strategy rests with a particular regulatory agency.¹²³

Although the regulations in effect before the enactment of Truth in Savings were primarily directed at advertising, the Federal Reserve Board had interpreted its regulations to address other perceived issues in the bank-depositor relationship, as well.¹²⁴ With appropriate direction from Congress, perhaps in the form of a joint resolution, all of the federal banking regulators might have been persuaded to adopt similar interpretations. Even without those additional regulatory interpretations, however, the fact that the Federal Reserve Board had taken the steps it did meant that as of June 1990, 40.7 percent of all banks in the country—controlling 76.2 percent of all bank assets—already were effectively covered by regulations aimed at the issues covered under Truth in Savings.¹²⁵

2. Target Specific Practices

Rather than imposing an ongoing, costly requirement of comprehensive disclosure, Congress could have identified the underlying specific practices that the witnesses found oppressive and made those practices illegal. Truth in Savings effectively adopted this approach with regard to the investable balance method of interest rate calculation.¹²⁶ Proponents of the bill, however, did not favor the approach of specifying particular methods of calculation that would be unac-

123. Cf. Helen A. Garten, *Regulatory Growing Pains: A Perspective on Bank Regulation in a Deregulatory Age*, 57 *FORDHAM L. REV.* 501, 568-77 (1989) (exploring the transition of banking regulation from a set of prophylactic prohibitions to a set of prudential restrictions and the challenges of banking regulators to adapt the regulatory changes to the realities of the banking marketplace).

124. The Federal Reserve interpreted its regulations to require that member banks: (1) disclose to the depositor at the time the account is opened the method to be used in paying interest; and (2) that depositors be given notice of any changes that adversely affect the calculation of interest. *Disclosure—Computation of Interest*, 1 Fed. Reserve Reg. Serv. pt. 2-420 (Apr. 1982) (Board interpretation), available in LEXIS, Banking Library, FRRS File; *Contract Terms*, 1 Fed. Reserve Reg. Serv. pt. 2-514 (Apr. 1989) (staff opinion of Sept. 21, 1979), available in LEXIS, Banking Library, FRRS File; *Disclosure—Reduction of Interest Rate*, 1 Fed. Reserve Reg. Serv. pt. 2-523.1 (Apr. 1989) (staff opinion of Dec. 15, 1981), available in LEXIS, Banking Library, FRRS File. In addition, the Federal Reserve outlawed so-called "teaser" rates by considering the advertising of an account with an annual rate of simple interest that exceeds its average effective yield to be inaccurate, misleading, and misrepresentative of the deposit contract. *Advertising—Time Deposits Not Subject to Interest Rate Limitations*, 1 Fed. Reserve Reg. Serv. pt. 2-411.1 (July 1982) (Board interpretation), available in LEXIS, Banking Library, FRRS File; *Advertising—Multiple-Rate Time Deposits and IRAs*, 1 Fed. Reserve Reg. Serv. pt. 2-411.3 (May 1984) (policy statement of Mar. 22, 1984), available in LEXIS, Banking Library, FRRS File.

125. U.S. DEP'T OF THE TREASURY, *MODERNIZING THE FINANCIAL SYSTEM XIX-2* (1991), reprinted in *Fed. Banking L. Rep.* (CCH) No. 1377, at XIX-2 (Feb. 14, 1991) (giving statistics for banks in the United States).

126. Truth in Savings Act, § 267, 12 U.S.C. § 4307 (Supp. V 1993).

ceptable because they believed banks would be able to avoid the dictates of the law.¹²⁷ Given the reluctance of the bill's supporters to agree to that approach, therefore, Congress could have mandated certain business practices, such as specific methods of interest calculation, in order to alleviate the problem. In fact, although opposed by the banking industry, this approach actually was considered, but was later rejected when H.R. 6 was combined with H.R. 447 to form H.R. 2654, the bill that eventually became Truth in Savings.¹²⁸ In the end, neither approach was adopted, again illustrating that the bill did not address a specific problem.

3. Create a Consumer Education Program

Most of the issues raised in the testimony flowed from the larger problem that consumers were relatively unsophisticated about financial matters and were being taken advantage of by banks. If lack of sophistication was the underlying problem, however, and the issues complained of in connection with Truth in Savings were but symptoms, Congress could have developed the sophistication of the public with regard to the consumption of financial services. Although one could argue that a disclosure statute performs the function of making consumers more sophisticated, in practice, disclosure alone will not benefit unsophisticated consumers.¹²⁹ Unless the information disclosed is delivered to the consumer in a manner he or she will understand, the disclosure statute will have no effect.¹³⁰ In order to correct this problem, therefore, Congress could have entertained the policy option of devising ways to increase customer sophistication. As one method, for instance, Congress could have created a program of consumer education courses in our nation's schools.

4. Develop a Government Rating System

If increasing customer sophistication represented an unachievable end, Congress could have devised a way to communicate the relative

127. See 1991 Hearings, *supra* note 53, at 17 (statement of Edmund Mierzwinski, U.S. Public Interest Research Group) ("And if you simply prohibit specifically, for example, the low balance method, the smart counsel for a bank will inform his or her operations staff, calculate interest on the next to low balance.").

128. See *supra* note 87. Although the prescribed interest calculation method had been considered, its relative merits in light of the goals of the statute were never explicitly discussed in the hearings.

129. See *supra* notes 63-73 and accompanying text.

130. STEPHEN BREYER, REGULATION AND ITS REFORM 163 (1982); Craswell, *supra* note 69, at 690-91; Sovern, *supra* note 68, at 25-27; Sunstein, *supra* note 69, at 424-25. While this point seems obvious, disclosure statutes are enacted with little discussion of whether the required disclosure will end up in the hands of a consumer who can actually understand and act on the information.

fairness of banking practices that eliminated the need for customer sophistication. The legislators might have opted to digest the relevant information for the people and develop a government-sponsored rating system that would let even the most unsophisticated bank customer understand whether his or her bank was offering a fair deal.¹³¹

5. Foster Industry Self-Regulation

Although heavily regulated industries historically have not been especially effective self-policers,¹³² Congress could have devised a system to encourage self-policing in accordance with strict guidelines. In fact, the banking industry had considered taking the initiative to enact a proposed self-policing mechanism in the early 1980s.¹³³ Although the banking industry missed that opportunity, Congress could have enacted legislation creating incentives for the industry to self-regulate.¹³⁴ Creating incentives for self-regulation might prove a meaningful method for Congress to provide more flexible and responsive regulation.¹³⁵

6. Foster Citizen Oversight

Yet another approach might have been for the government to sanction the creation of a system of citizens' banking and insurance boards.¹³⁶ These boards could have served as "watchdogs" over the financial services industry and warned customers of abusive practices.¹³⁷

Instead of considering any of these options, however, Truth in Savings marched through its twenty-three year journey as a disclosure

131. Professor Rubin suggested the possibility of such a scheme. Rubin, *supra* note 1, at 289.

132. HELEN A. GARTEN, WHY BANKING REGULATION FAILED 151-52 (1991). Although, in general, highly regulated industries have not proven to be adept at self-regulation, exceptions to the general rule exist. The securities industry provides an example of a heavily regulated industry that nevertheless polices itself. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 104 (1992).

133. The plan would have called for banks belonging to the American Bankers Association to contribute to fund an industry-run advertising enforcement agency. Alice Arvan, *Promise-the Moon IRA Ads: Trouble Ahead*, AM. BANKER, Feb. 16, 1982, at 9.

134. Recently, the state of Texas passed legislation creating incentives for its chemical industry to voluntarily comply with the stringent guidelines of the Texas hazardous waste law. *All Things Considered* (National Public Radio broadcast, Dec. 28, 1992) (transcript on file with author).

135. AYRES & BRAITHWAITE, *supra* note 132, at 101-32; CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 13 (1977).

136. An article in *American Banker*, the newspaper of record for the banking industry, discussed the possibility of such boards. *Deregulation Has Potential for Consumer Confusion, Abuse*, AM. BANKER, July 12, 1983, at 6.

137. In the chartering legislation, Congress could have given the boards the right to include notices in regular mailings of financial institutions. *See id.* at 8.

statute. The fact that the disclosure approach might not be effective,¹³⁸ that it clashed with the banking regulators' agenda of reducing the regulatory burden,¹³⁹ and that the regulators of banking's chief competitor—the mutual fund industry—were proposing to require even less disclosure,¹⁴⁰ had no effect on the evolution of the legislation. Truth in Savings went through the process as if in a vacuum; exogenous factors could not change its basic approach. It could only be fine-tuned by reference to its own provisions.

What a statute aims to do and how it aims to do it are closely related, but different, questions. Different problems call for different solutions. By not clearly defining what problem Truth in Savings sought to address, Congress could not have chosen among the various policy options available, even if it had identified those options. While more rigorous problem framing and methodology will not guarantee a statute's effectiveness, poor problem framing and methodology makes failure likely.

II. FLAWS IN THE PROBLEM-SOLVING METHODOLOGY

If the goal of legislation is to solve problems,¹⁴¹ the legislative drafter should adopt a problem-solving methodology. Problem solving, though one of the most basic human activities, remains a poorly understood process.¹⁴² While we remain in the dark about the process by which individuals solve problems, the process by which groups solve problems presents an even more difficult subject of study.¹⁴³ Despite our collective ignorance of how both groups and individuals

138. BREYER, *supra* note 130, at 162; Craswell, *supra* note 69, at 690-91; Sunstein, *supra* note 69, at 424-25.

139. 1991 *Hearings*, *supra* note 53, at 57 (statement of the Board of Governors of the Federal Reserve System); 1989 *Hearings*, *supra* note 89, at 5-6 (statement of Martha Seger, Governor, Federal Reserve Board).

140. Mutual fund shares are securities and, as such, may only be purchased after the purchaser has obtained a prospectus from the fund. The prospectus contains a great deal of information, but—as a practical matter—is only a formality, as the investment gets sold through advertisements or brokers. Recognizing the hollow nature of the prospectus requirement, the SEC supports a change in the mutual fund rules to allow no-load mutual funds to sell shares with clip out coupons in newspapers and magazines. Claudia Cummins, *SEC Policy Likely to Support Mutual Fund Innovations*, *BANKING WK.*, Jan. 11, 1993, at 11.

141. For a response to the criticism that legislation is not concerned with solving problems, see *infra* notes 149-73 and accompanying text.

142. Although no one completely understands the problem-solving process, various researchers have given the topic considerable thought. For a utility-maximizing approach, see SHAUN H. HEAP ET AL., *THE THEORY OF CHOICE: A CRITICAL GUIDE* 36-50 (1992). For a perspective from the field of cognitive psychology, see Torney-Purta, *supra* note 116; Voss et al., *supra* note 116.

143. For a general discussion of the differences between individual and collective choice, see HEAP ET AL., *supra* note 142, at 199-216.

solve problems, however, intuition and logic suggest that the first step in any problem-solving methodology should be to identify the problem.¹⁴⁴

As currently structured, the legislative process does not necessarily begin by identifying and defining the problem to be corrected. Although the sources of legislation are too numerous to make a general statement,¹⁴⁵ a significant number of bills evolve in a manner similar to the path followed by Truth in Savings. In this mode of legislative development, Congress essentially starts with a solution in the form of a bill. The existence of that bill in the legislative process causes a series of events to take place, including the holding of subcommittee hearings to clarify the issues and discuss the pros and cons of the proposed legislation.¹⁴⁶ When Congress operates in this manner, it in effect puts the cart before the horse by considering the solution (in the form of the proposed bill) before it has fully investigated the problem (through the hearing process). With the solution in hand before the problem has been fully analyzed, Congress fails to get the problem-solving process off on the right foot.¹⁴⁷

As the following discussion illustrates, even if Congress wanted to engage in rigorous problem framing, however, political and structural impediments might prevent it from doing so. Professor Robert Seidman has persuasively argued that an effective problem-solving methodology requires the problem framer to separate facts from values, to

144. This intuitive step is supported by the two other works that have specifically addressed the challenges of legislative methodology. See Rubin, *supra* note 1, at 285-86 ("The proper starting point for the design of effective legislation is an issue, not a bill."); Seidman, *supra* note 5, at 5 ("Following a four-part problem-solving methodology, the memorandum first ought to specify the behavior constituting the social problem at which the legislation aims. . ."). In addition, material dealing with drafting legislation starts with identification of the problems. See HIRSCH, *supra* note 12, § 1.1, at 2; Purdy, *supra* note 19, at 99-100.

145. See *supra* notes 14-15 and accompanying text.

146. In some circumstances administrative agencies, executive branch departments, or knowledgeable committee staffers prepare legislation after a thorough policy analysis. Under another scenario, a bill may be drafted with the assistance of policy analysis prepared by the General Accounting Office or the Office of Technology Assessment. There are other ways that bills evolve as well, see *supra* notes 20-24 and accompanying text, but many of the bills taken up by Congress came into being in a way similar to the path taken by Truth in Savings.

147. When legislation in the Truth in Savings mode is subjected to the problem-framing step at all, the task appears to fall on the shoulders of the legislative drafter. FILSON, *supra* note 12, at 31-36; HIRSCH, *supra* note 12, § 1.1, at 2; Purdy, *supra* note 19, at 98-100. Legislative drafters (usually someone other than the elected representative), for their part, often find that they have no trouble grasping the problem because the sponsor of the legislation has instructed them what the problem is and what the bill should aim to do. FILSON, *supra* note 12, at 31. As a result, the drafter expends remarkably little effort on what should be the most important aspect of the drafting process—problem identification.

adopt a sophisticated model of the real world, and to address causes rather than conditions.¹⁴⁸ Political realities may prevent attaining these conditions. In addition, problem framing may not receive the attention it deserves due to the failure to appreciate the power the problem framer possesses in the legislative process.

Before considering the elements that affect the problem-identification process, however, I must first address an underlying premise of this discussion, which until this point has been assumed: that legislation serves a problem-solving function. This Article proceeds on the belief that the purpose of legislation is to solve problems. Not all readers, however, will subscribe to a similar belief. Therefore, before dealing with the failure of problem identification, a discussion of the role of problem solving in the legislative project is in order.

A. *The Role of Problem Solving in the Legislative Project*

The belief that legislatures exist to solve social problems is not an immutable and universal truth. Empirical evidence shows that Congress often proposes or passes pieces of legislation that have nothing to do with solving problems, but rather are merely political statements.¹⁴⁹ Putting aside obvious political statements, however, some people might characterize the legislative project not as an exercise in problem solving, but rather as an effort to effect a wealth transfer from one group to another.¹⁵⁰

148. These three requirements for effective problem identification are drawn from Professor Seidman's discussion of the philosophical beliefs to which legislative drafters must subscribe in order to be effective. Seidman, *supra* note 5, at 32.

149. A significant percentage of all bills placed in the legislative hopper do not seriously attempt to solve perceived social problems, or even to do the bidding of interest groups, but rather serve only as a way for a representative to attract publicity, or to go on record as a proponent or opponent of a particular idea. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 83 (3d ed. 1989). In addition, members of Congress spend a great deal of time and energy passing specialty bills for constituents, such as "commemorative" legislation establishing National Grapefruit Month. See Helen Dewar, *A Day (or Month or Year) in the Sun: "Commemoratives" Accounted for Much of Legislation Enacted in '91*, WASH. POST, Jan. 13, 1992, at A15. The scope of this nonsubstantive legislative activity boggles the mind. In 1977, four percent of all laws enacted were commemoratives. HOW CONGRESS WORKS 43 (Mary W. Cohn ed., 2d ed. 1991). By 1985, the percentage of commemoratives had increased to 59% of all public laws enacted by Congress. *Id.* Even given Congress' recent tendency to enact fewer but more massive public laws, this increase is startling.

150. This position is taken by many scholars who operate within the loosely knit group of public choice theorists. See Tollison, *supra* note 31. Stating a general theory of public choice is impossible because there are many variations on the set of core principles that have inspired many of the scholars. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 21-33 (1991); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 143 (1989).

The recognition that legislatures are influenced to a significant degree by organized interest groups and other factors has led to the development of "public choice" theories of legislative behavior in the political science, economics, and legal fields.¹⁵¹ A "public choice" model of legislation most often refers to one of the several economic models of legislation that have been proposed over the years, or, more frequently, to an amalgam of those various theories.¹⁵² In their simplest form, the economic models depict legislation as a product sold in a market by legislators to interest groups in exchange for money or votes.¹⁵³ In a more sophisticated form, the economic model places legislators in the thick of the market, where they act as brokers of wealth transfer from one group to another.¹⁵⁴

151. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883 (1987). Much of the theoretical work relates to organization theory and group decisionmaking. A significant school of thought within the movement owes much to the work of Kenneth Arrow, who developed the famous theorem that bears his name. Arrow's Theorem holds that, under certain conditions, it is impossible to aggregate the preferences of a given group because the way in which voting is conducted could result in an infinite cycling of choices. See *id.* at 902. For a useful summary of Arrow's Theorem and its larger implications, see HEAP ET AL., *supra* note 142, at 209-15. Despite being thought-provoking and insightful, Arrow's Theorem does not serve as the foundation for the model of legislative behavior most frequently referred to as the "public choice" model. Farber & Frickey, *supra*, at 904-06. Instead, the "public choice" theory of common parlance derives from the application of economic principles to the political process. I have gathered some of the common threads of the various versions of the economic public choice theory for discussion here.

152. Economic models of legislation have been in existence at least since the late eighteenth century, but the most recent wave of theories trace their roots to the 1950s. Mashaw, *supra* note 150, at 124. While the economic model possesses great power to explain how statutes get passed, scholars have debated whether a world view dominated by bargaining interest groups and excluding higher values runs the risk of becoming morally impoverished and ultimately politically illegitimate. See, e.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 180 (1988); Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989); Farber & Frickey, *supra* note 151, at 906-24; Mashaw, *supra* note 150.

153. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 496-99 (3d ed. 1986).

154. Tollison, *supra* note 31, at 343. Although the legislative process may be seen as an economic transaction, it cannot be compared to such straightforward economic transactions as, say, buying a major appliance, because the groups that bargain for the legislation usually cannot take immediate delivery. While the economic theory of legislation casts legislators as brokers of legislatively enforced wealth transfers, *id.*, it is an odd kind of brokerage arrangement because legislators get paid their commission even if they do not deliver the legislative product. The political system allows the sponsors of bills to return to interest groups and say, "I'm working hard for the passage of that law, but special interests, or the committee chair, or the other party have blocked its progress." HOW CONGRESS WORKS, *supra* note 149, at 42-43. In exchange for the representative's efforts (not necessarily his or her results), the group will pay with political or financial support. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 71 (1990). At some point, however, the sponsor has to deliver the legislative product or run the risk of appearing ineffectual. Finding the right time to get the bill passed presents a tricky

Truth in Savings can be analyzed as an example of legislation as brokered wealth transfer. The legislation calls for a wealth transfer from banks to their customers. Proponents of Truth in Savings admitted that the bill was intended to cause just such a wealth transfer.¹⁵⁵ In the public choice view, Truth in Savings shifts the cost of deciphering information from the unsophisticated depositor to the bank. In exchange for that transfer, various members of Congress extract a commission in the form of additional political or financial support from the consumer lobby.¹⁵⁶

While the history of Truth in Savings can be interpreted through the public choice model of legislation, the public choice view is not the only way to look at legislative behavior. The public choice model's primary modern intellectual counterweight is the neo-republican model.¹⁵⁷ Justifying Truth in Savings in the language of the neo-re-

calculation because it is in the legislator's self-interest to extract continuing support from the affected groups by having the bill come up in session after session.

155. In the words of Dr. Richard L.D. Morse, long-time advocate for comprehensive deposit account disclosure: "The cost of explaining these complexities [of methods of interest calculation] will [after the enactment of Truth in Savings] become part of the cost considerations which the bank should calculate. Under the present law, the cost of deciphering is borne totally by the unsophisticated depositor." 137 CONG. REC. H6758, 6762-64 (daily ed. Sept. 24, 1991).

156. Of course, under the public choice theory of legislation, a wealth transfer that benefits one group will result in a decrease in the wealth of another group. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 354-55 (1990). The group from whom the wealth transfer is to be taken will resist the transfer and spend resources to prevent its occurrence. *Id.* If the rent-seeking group demanding the wealth transfer and the group from whom the transfer will be extracted are equally well-organized, the transfer will not occur. *Id.* The brokered wealth transfer will occur only if the constituency from whom the transfer is taken perceives the costs of opposing the transfer to outweigh the costs of allowing the transfer to take place. Tollison, *supra* note 31, at 343-44. In the case of Truth in Savings, the group from whom the wealth transfer was being extracted—the banking industry—did not fight the enactment of the law very strenuously, perhaps because it sensed long-term benefits would outweigh the short-term costs, or perhaps because many banks were already providing the disclosures required by Truth in Savings as required by state law or existing federal regulation, or perhaps because in that session of Congress the banking industry had more important issues on which it needed to spend its political capital. Truth in Savings was one small part of a very large bill, the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236 (codified as amended in various sections of 12 U.S.C.). The Federal Deposit Insurance Corporation Improvement Act (FDICIA) contained many provisions that affected the business of banking much more profoundly than Truth in Savings, such as strengthened capital requirements, deposit insurance reform and new enforcement powers for regulators. Federal Deposit Insurance Corporation Improvement Act, § 305, 12 U.S.C. § 1828o (Supp. IV 1992); *id.* § 311, 12 U.S.C. § 1821 (Supp. IV 1992); *id.* § 307, 12 U.S.C. § 1818 (Supp. IV 1992). In any event, the banking industry did not oppose the passage of Truth in Savings as strongly as it might have.

157. In attempting a brief discussion of the "republican" model, one runs the risk of over-simplifying the case, especially in light of the fact that there is not one republican model, but many. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (discussion of republicanism from

publican model¹⁵⁸ requires that we find Truth in Savings to be a public-regarding solution to a community problem, the identification and solution of which came about through public-spirited deliberation. Because the neo-republican model is best viewed as an aspirational,¹⁵⁹ rather than a descriptive, model of legislative behavior, it should not be surprising that in its particulars the process by which Truth in Savings was adopted fell short of the neo-republican model.¹⁶⁰

feminist point of view). For a history of the republican tradition, see J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992). What follows, however, is a discussion of those elements that seem to form the paradigm of "neo-republicanism," which attempts to update traditional republicanism into a form more consistent with modern sensibilities. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547-58 (1988).

158. The following discussion of the neo-republican view of legislative behavior rests on the four foundational principles of citizenship, political equality, problem solving for the common good, and deliberation articulated by Professor Sunstein. See Sunstein, *supra* note 157.

159. Although the republican model has been used to describe how legislatures work, at least in part, see, e.g., Allan W. Vestal, *Public Choice, Public Interest, and the Soft Drink Interbrand Competition Act: Time to Derail the "Root Beer Express"?*, 34 WM. & MARY L. REV. 337, 354-60 (1993), it is not well-suited as a descriptive model. Instead, the republican model serves better as an aspirational model that provides guidance and direction. As Professor Sunstein points out, "The republican belief in deliberation is aspirational and critical rather than celebratory and descriptive. . . . Modern republicans do not claim that existing systems actually embody republican deliberation." Sunstein, *supra* note 157, at 1549.

160. First, the neo-republican model holds as a fundamental assumption the idea that political power comes from the community. Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 811-833 (1993); Sunstein, *supra* note 157, at 1555-58. The rights of citizens to life, liberty, and the pursuit of happiness—together with their concomitant responsibilities to participate in the political process—play a central role in the lawmaking process. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503-04 (1988) [hereinafter Michelman, *Republic*]. (In actuality, however, laws are far more likely to originate in the offices of elected officials or at administrative agencies than from constituent requests. FILSON, *supra* note 12, at 29.) Truth in Savings clearly lacks this neo-republican attribute. The real impetus behind Truth in Savings was not a general public outcry. In fact, during the hearings on the bill, Congressman Thomas commented on the lack of such public concern. 1991 Hearings, *supra* note 53, at 2. Instead, from 1984 on, the bill owed its existence to the personal motivation of Representative Richard Lehman of California, the self-acknowledged "godfather" of Truth in Savings. *Id.* at 3. Representative Lehman testified that he introduced the 1984 version of the Truth in Savings bill "after noticing a great number of . . . misleading advertisements in newspapers, magazines, and even on billboards on the side of the road." 1984 Hearings, *supra* note 17, at 5. Far from being an expression of the popular will, this legislative act was the ultimate paternalistic measure.

A second key element of the neo-republican ideal is that the people and their representatives have access to the political process and participate in that process in a meaningful way. The neo-republican model posits that all citizens have equal access to the political machinery. Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 27 (1986) [hereinafter Michelman, *Foreword*]; Sunstein, *supra* note 157, at 1552-53. Similarly, their political representatives play meaningful and valuable roles in the political process within Congress. Under the neo-republican model, a representative's position in the legislature (that is, seniority, party affiliation, committee assignment) should not

influence his or her effectiveness because he or she, too, is one among many political equals. The history of Truth in Savings also lacks this second key element. As noted above, Truth in Savings was not a major concern for the people. They may have had access to the political system regarding the issue, but they did not use it. Moreover, the political representatives of the people did not play a truly meaningful role in the process either. See *infra* notes 225-42 and accompanying text. Although the neo-republican ideal aspires to the concept of political equality, see Michelman, *Republic*, *supra*, at 27; Sunstein, *supra* note 157, at 1552-53, reality forces us to recognize that all representatives are not created equal—some have more talent than others, some have more seniority, some have better committee assignments; they do not enjoy equal power. Tollison, *supra* note 31, at 353-54.

The third element of neo-republicanism calls for the legislature to address problems for the common good. Fallon, *supra* note 31, at 1698; Michelman, *Foreward*, *supra*, at 1503-04. It holds that at least some problems can be addressed with "substantively right answers" for the public good without regard to political ideology or individual preferences. Sunstein, *supra* note 157, at 1541. As we have seen, however, Congress did not in any rigorous way attempt to identify exactly what problem Truth in Savings was supposed to address. One might argue that, on its face, the statute should be considered for the common good because it obviously addresses the noble social goal of consumer protection. This assertion is the strongest neo-republican argument justifying Truth in Savings, and on the most superficial level, it seems consistent with the neo-republican ideal. On a deeper level, however, the broad purpose of consumer protection does not tell us much about the specific problem the legislation was intended to address or how that problem relates to the common good.

Finally, the fourth and most vital element of the neo-republican model is public-spirited deliberation. The concept of deliberation occupies a paramount position in the neo-republican model. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-48 (1985). The theory holds that civic virtue motivates lawmakers to deliberate and reach the best conclusion consistent with the common good. Sunstein, *supra* note 157, at 1548-51. Once again, Truth in Savings also lacks this element of the neo-republican model. The debates and hearings relating to Truth in Savings over the years are devoid of true deliberation. When Congress held hearings on the proposed Truth in Savings legislation, most of the persons testifying represented consumer groups. See *1991 Hearings*, *supra* note 53; *1989 Hearings*, *supra* note 89; *1984 Hearings*, *supra* note 17. The groups uniformly supported the proposed legislation, although many tried to make the case for even more extensive disclosure. See, e.g., *1991 Hearings*, *supra* note 53, at 53 (testimony of Edmund Mierwinski). In some cases, the banking lobby did not even appear before the committee, but merely sent a letter to the committee registering dissent. *1989 Hearings*, *supra* note 89, at 81; *1984 Hearings*, *supra* note 17, at 174. In addition to the banking industry, the various federal banking regulators voiced their opposition to the legislation. See, e.g., H.R. 5094 REPORT, *supra* note 82, at 407, 412, reprinted in Fed. Banking L. Rep. (CCH) No. 1245, at 407, 412. The federal regulators believed the then-existing federal regulations, see 12 C.F.R. §§ 217.6, 329.3, 563.27 (1992), already offered the protection sought by the proponents of Truth in Savings. *1991 Hearings*, *supra* note 53, at 55 (statement of the Board of Governors of the Federal Reserve System). The regulators also warned that additional regulatory requirements on the banking industry would be harmful both to the industry and its customers. *Id.* at 56 (statement of the Board of Governors of the Federal Reserve System); *1989 Hearings*, *supra* note 89, at 4 (testimony of Martha Seger, Governor, Federal Reserve Board); H.R. 5094 REPORT, *supra* note 82, at 406-07 (testimony of L. William Seidman, Chairman, Federal Deposit Insurance Corporation), reprinted in Fed. Banking L. Rep. (CCH) No. 1245, at 406-07. Yet, despite comments from the regulatory experts that the regulation was unnecessary, and despite the admission by the chief consumer group that its study of rising consumer banking costs was unscientific, *CFA Study*, *supra* note 52, the committee's published proceedings provide little evidence of any meaningful deliberation over how much deference to pay to the regulatory agencies or how much credence to give the consumer group's statistics. The failure to engage in a

The experience of the Truth in Savings Act and much recent scholarship tells us that more is going on in the legislative process than can be explained by the neo-republican model.¹⁶¹ Yet, at the same time, the public choice model also fails to provide a complete explanation of how laws are enacted.¹⁶² Although Congress sometimes enacts ob-

dialogue with the regulatory agencies not only pays short shrift to the neo-republican ideal, it also provides an unfortunate example of the lack of coordination between the legislative branch and the regulatory agencies concerning strategies for regulatory implementation. See GARTEN, *supra* note 132, at 64-66.

The actual subcommittee debate in the year Truth in Savings finally passed was fairly perfunctory. It consisted in large part of Representative Thomas of Wyoming (the most junior member of the minority party) questioning whether the bill was really necessary. 1991 *Hearings*, *supra* note 53, at 2-3. Debate beyond the committee stage was virtually nonexistent. The *Congressional Record* on the day the bill passed the House chronicles glowing endorsements of the measure, with the only negative note being a concern that the statute might "create another title in the 'Lawyers Full Employment Act.'" 137 CONG. REC. H6758, 6762 (daily ed. Sept. 24, 1991) (statement of Rep. McCandless). The lack of debate should not come as a great surprise, as it is probable that few members of Congress were aware what the bill contained. In reality, most members of Congress (other than the committee members) probably never even read the Truth in Savings Act. According to one member of Congress, surprisingly few members of Congress even have the chance to read specific pieces of pending legislation. Symposium, *supra* note 1, at 9 (comments of Rep. Christopher Cox).

161. See, e.g., Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673 (1988) ("[W]hat is missing from the republican revival is an appreciation of the frightening power of man to subvert the offices of government for what can only be described as evil ends."); see also Donald J. Boudreaux & Robert B. Ekelund, Jr., *The Cable Television Consumer Protection and Competition Act of 1992: The Triumph of Private Over Public Interest*, 44 ALA. L. REV. 355 (1993).

162. One problem with the public choice approach is that it does not comport with empirical evidence. For instance, contrary to what would be expected by public choice theory, one research study found little evidence that PAC contributions influenced voting behavior. In those situations where a correlation existed, the PAC contributions were actually better seen as symptomatic of a more important and larger package of support for the representative from the interest group. Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency is Complex*, 33 AM. J. OF POL. SCI. 1 (1989), reprinted in 8 THE CONGRESS OF THE UNITED STATES, 1789-1989 689 (Joel Silbey ed., 1991) [hereinafter CONGRESS]; see also Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 236-68 (1988).

Other scholars have criticized the methodology of the public choice approach as failing to give weight to legitimate concerns about the public interest that legislators may have had and instead constructing an ex post explanation for legislative behavior based on who benefitted from the legislation. See, e.g., Langevoort, *supra* note 36, at 692 (criticizing the public choice critique of the Glass-Steagall "wall" separating commercial and investment banking as a bargain struck by special interest groups).

[T]he claims [of the public choice scholars] . . . are based on deduction rather than discovered fact: convinced there is no *rational* economic policy to support a wall of separation between banking and the securities industry . . . they conclude that the only possible alternative explanation is a skewing of the political process by those who later turned out to be immense beneficiaries of the statute.

Id.; see Rubin, *supra* note 9, at 5-31 (offering a comprehensive criticism of the public choice movement and concluding that its focus on economic motivations, while providing the

vious political bargains into law as public choice theorists would predict,¹⁶³ at other times it enacts laws that appear to benefit no particular interest group.¹⁶⁴

On close examination, therefore, neither model describes all legislative enactments. Because both models are incomplete, to look at the actions of legislatures exclusively through one theoretical lens or the other distorts one's perception. Instead of viewing legislative behavior as either "neo-republican" or "public choice," it may be more profitable to visualize it as lying on a continuum, defined on one end by the paradigmatic neo-republican model and at the other end by the pure form of the economic public choice model. The explanation for most legislation would lie somewhere in between these two extremes. Describing legislative behavior at either end of the spectrum presents little difficulty because we can merely invoke the language of either the neo-republican or the public choice paradigm, as the case may be. In reality, however, very few pieces of legislation can be completely explained solely in the language of either the public choice or the neo-republican model.¹⁶⁵

While the two models seem incompatible, at least three ways emerge in which they work together to shape legislative behavior: (1) legislators must justify their actions in the language of the neo-republican model; (2) the public uses the neo-republican model as a standard against which to evaluate legislative behavior; and (3) individual legislators may find inspiration in the ideals of the neo-republican model.

1. The Justification Role

The neo-republican model embodies our ideals and myths about what we want our government to be. We have largely defined the legitimacy of political action in light of the model's foundational princi-

benefit of a simple model, distorts the legislative process by failing to consider that legislative behavior is more complex than a reelection-maximizing model countenances: "[Legislators] want to be re-elected, as they readily admit, but they also want to represent their constituents' views, to make good public policy, and to be well-respected by their peers. All these motivations are quite conscious, and none are overwhelming in their impact").

163. Some scholars have suggested that the Smoot-Hawley Tariff of 1930 provides an example of interest-group bargaining for legislation. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 40-46 (1988).

164. Examples of this type of legislation might include proposals to reduce the deficit or to "reform" welfare. Some scholars maintain that even traditional economic regulation cannot be entirely explained by the public choice model. See ARNOLD, *supra* note 154, at 224-61.

165. See ESKRIDGE & FRICKEY, *supra* note 163, at 37-64; Boudreaux & Ekelund, *supra* note 161; Vestal, *supra* note 159.

ples.¹⁶⁶ Those principles represent potent political ideals. Representatives understand that the political legitimacy of their actions will be judged by their citizen constituents under a civics class neo-republican model. Therefore, representatives understand that they must justify their actions in terms of the neo-republican ideal.¹⁶⁷ While by no means an ironclad checking mechanism, the justification function of the neo-republican model does impose some discipline on the legislative process.¹⁶⁸ Although the flexibility of language allows legislators a great deal of latitude in explaining their actions—enough so that some actions taken solely for political or personal gain might nevertheless be capable of rationalization using the general terms of the neo-republican ideal—the language is not infinitely flexible. Actions incapable of justification will not survive scrutiny.

2. Standard to Evaluate Legislative Behavior

In addition to its role in justifying legislative action, the neo-republican model can also provide a check on the public choice model if we allow the models to exist side by side: one as aspiration, one as description.¹⁶⁹ If legislative action falls too far short of the ideals of the

166. The model of government by which most Americans judge the legitimacy of governmental action is informed by the lessons learned in civics class. The civics class model of legislative behavior shares the foundational principles of the republican model. See *supra* notes 16, 158.

167. Seidman, *supra* note 5, at 7.

168. Despite the justification requirement, representatives can nevertheless invoke the language of the republican model to disguise the fact that they are acting for political purposes or on behalf of special interests. No representative ever publicly admits to taking action purely for political purposes without regard to the common good. Similarly, no representative would urge passage of a bill (or argue against it, as the case may be) on the strength of the bald admission that powerful interest groups paid good money for it. All opposition (and support, for that matter) for proposed legislation must be cloaked in the language of public interest and common good. Sunstein, *supra* note 160, at 78 ("Requiring justifications does not, to be sure, guarantee 'reasoned analysis' on the part of the legislature. . . . But requiring justification does provide an important prophylactic function.").

169. The distinction between aspirational models and descriptive models raises some conceptual problems. Many Americans regard the model of legislative behavior they learned in civics class as a descriptive model, when it should really be understood as an aspirational model—like the republican model developed by modern legal scholars. Consequently, many Americans believe the civics class model describes how Congress *does* work, instead of how it *ought* to work. Because of this confusion, our citizens have encountered a great deal of difficulty rationalizing the actions they observe legislators taking. When citizens see legislators behaving as the political beings they are instead of the public-spirited beings required by the civics class model, they perceive the system to be broken because it does not comport with their mental models.

The clash between the aspirational and the descriptive brings us back to Bismarck's observation about sausage and legislation. Our aspirational model of sausage provides one reason why we do not want to see sausage being manufactured: we want to believe that sausage is meat. While this mental model of sausage holds some truth—sausage does

neo-republican model, the people can discipline their representatives. Appropriate discipline might include not voting for the incumbent at reelection, spouting off on a call-in show, writing a letter to the editor, or starting a recall petition. Political adversaries of the incumbent will try to cast the incumbent's record in a light that raises concerns about how closely actual behavior has approached the neo-republican ideal, and the electorate will make the decision.¹⁷⁰

3. Neo-Republican Model as Inspiration

The neo-republican model also serves as a source of inspiration to individual legislators. Congressional representatives have been inculcated with the same values inherent in the civics class model of legislative behavior as the rest of mainstream America. Somewhere in the cores of their beings, legislative representatives believe the underlying values of the neo-republican ideal are meaningful, and in some cases, those values may inspire the representative to "do the right thing."¹⁷¹

In these ways, the two forces at the ends of the continuum—neo-republicanism and public choice—work on each and every legislative act, not to their mutual exclusion, but rather in dynamic tension. In some situations, congressional behavior lies close to the neo-republican end of the spectrum, and the resolution of community issues through public-spirited deliberation is the activity it truly concerns itself with. As congressional action moves further from the neo-republican ideal, the goal of effecting wealth transfers from one interest group to another may play an increasingly important role in the legislative process, but the need to justify the legislation in terms of the public interest and the common good remains.

Given the dynamic tension between neo-republicanism and public choice, the legislative process should conform (or at least appear to conform) to the neo-republican model as much as possible. Moving in that direction would serve the legislators' interests in at least two ways. First, to the extent legislators themselves are frustrated republi-

contain meat—it certainly does not tell the whole story. If we saw sausage being made we would see that it also contains fat, gristle, spices, filler, and unspeakably disgusting parts. See 9 C.F.R. §§ 319.140-.182 (1993). It is not purely meat—it is at once something much more and much less than meat. Similarly, the republican model of legislation holds as a central belief, or at least a central aspiration, that legislators deliberate to solve problems for the common good. While this belief holds some truth—many, perhaps most, members of Congress probably believe that they are civic-minded representatives who want to do what is best for the people they represent, see Symposium, *supra* note 1, at 43 (statement of Rep. Barney Frank)—it does not tell the whole story either. The legislative process involves interest group pressures, dealmaking, institutional politics, and many other factors, along with at least some problem solving thrown in.

170. Cf. ARNOLD, *supra* note 154, at 71-73.

171. Symposium, *supra* note 1, at 43 (statement of Rep. Barney Frank).

cans, making the process comport with the neo-republican ideal is the normatively right thing to do. Second, to the extent legislators are also actors in the public choice model, a process that more closely resembles the neo-republican model makes it easier to justify political actions and to fend off political opponents.

To help keep the descriptive public choice model and the aspirational neo-republican model as closely aligned as possible, legislative drafters should focus their attention on the problem-solving process. Problem solving comports with both extremes of the legislative behavior continuum. The neo-republican paradigm holds as a fundamental tenet the goal of solving problems for the common good.¹⁷² At the same time, the public choice paradigm also requires legislators to engage in problem solving, although the problem takes the form of devising an effective method to bring about a wealth transfer from one group to another.¹⁷³ Therefore, at both ends of the spectrum, legislators must find effective means to solve problems.

Having established the central role of problem solving to the legislative project, I now turn to several obstacles that prevent effective problem framing in the legislative process. These obstacles include the failure to candidly identify values and facts, the failure to adopt a sophisticated model of the real world, the failure to separate causes from conditions, and the failure to appreciate the power of the problem framer in the legislative process.

B. The Failure to Candidly Identify Values and Facts

As currently established, the legislative process erects formidable obstacles to the problem-identification process. One of the greatest obstacles comes from the failure of legislatures to grapple with the interconnectedness of facts and values. Problems do not exist in the abstract. They only exist with reference to a set of values that classifies a given phenomena as problematic. Because everyone has their own unique set of values, the same phenomena may present a problem for one person but not for another.¹⁷⁴ Therefore, one cannot identify a problem without first identifying, implicitly or explicitly, the values that are offended by the particular phenomenon at issue.

172. See *supra* notes 157-60 and accompanying text.

173. See *supra* notes 152-56 and accompanying text.

174. Take as an example one of the problems identified during the hearings about Truth in Savings—the imbalance of power between banks and their customers. This condition may present a problem if one sees the concentration of economic power in a few large corporations as wrong. On the other hand, if one believes that the natural order of things calls for a class of wealthy people to control the economy and to be responsible to the masses under a notion of *noblesse oblige*, then the disparity in economic power presents no problem whatsoever.

Legislative drafters must struggle with this process every time they address a problem. In some way, the legislative drafter must ask herself: "Under what set of values does the phenomenon complained of constitute a 'problem'?" Because every legislator brings his or her own meaning to the text of the bill,¹⁷⁵ if the drafter wants the bill to pass, she must craft the bill's text in such a way that, regardless of the meaning individual legislators bring, a critical mass of legislators—applying their own sets of values—will consider the phenomenon a problem that deserves attention.

Truth in Savings provides an example of the difficulty in candidly identifying facts and values in the context of problem identification. Although the legislative materials do not provide a specific place where one may turn to discover the exact problem that Truth in Savings was intended to correct, the statute does contain a findings clause that should shed some light on the problem being addressed. Although the findings clause cannot be interpreted as speaking definitively about the purpose of the statute,¹⁷⁶ it must convey some information about it.¹⁷⁷ Truth in Savings makes the following findings:

SEC. 262(a) FINDINGS.—The Congress hereby finds that economic stability would be enhanced, competition between depository institutions would be improved, and the ability of the consumer to make informed decisions regarding deposit accounts, and to verify accounts, would be strengthened if there was uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed in connection with such accounts.¹⁷⁸

If we take the findings clause literally, the drafter has identified three problems that existed prior to the enactment of Truth in Savings: (1) the economy was not as stable as it could be; (2) depository institutions were not as competitive as they could be; and (3) consum-

175. When analyzing a bill, a legislator is like any actor who must interpret a written text. The reader brings his or her own set of beliefs to the text and interacts with the text to reach some meaning. The text does not determine the meaning the reader reaches, but it plays an important role in the process. See Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 791-92 (1992).

176. See WILLIAM P. STATSKY, *LEGISLATIVE ANALYSIS AND DRAFTING* 168 (2d ed. 1984) ("The main danger is that [purpose clauses] will not accurately reflect what the legislature did in the rest of the statute. The purpose clause, for example, may be underinclusive in that it does not appear to cover everything in the statute."); see also DICKERSON, *supra* note 12, at 286; Hirsch, *supra* note 12, § 4.2, at 29-30.

177. Judges will consider the purpose clause when interpreting the law in order to understand what purpose Congress intended the statute to achieve. STATSKY, *supra* note 176, at 98. At a minimum, the drafter who put the bill together must have had something in mind as a problem when she set pen to paper. That is, she must have believed that a required system of comprehensive account disclosure would accomplish something.

178. Truth in Savings Act, § 262(a), 12 U.S.C. § 4302(a) (Supp. V 1993).

ers' ability to determine the true terms of their accounts was not as easy as it might be.¹⁷⁹ While these official findings may provide some evidence of what the drafter perceived the problem to be, they appear to be at odds with the problems identified during the hearings.¹⁸⁰ The legislative drafter likely was aware of the real problems of imbalance of bargaining power, deceptive advertising, and misleading methods of computing interest identified by the proponents. Yet, instead of adopting those problems in the findings section, she chose to describe the purpose of the bill as promoting economic stability, increased competition, and comparison shopping.

The disparity between the official findings and the real problems evidences the drafter's efforts to translate the real problems into politically acceptable language.¹⁸¹ The drafter phrased the findings clause

179. A moment's reflection on these problems, however, should give the reader pause. Two of the goals—economic stability and the creation of competition—represent two of the most intractable problems in economic theory. Certainly, the drafter did not believe that Truth in Savings' disclosure requirement would correct these problems, although she may have believed that the statute's requirements would move the economy closer to those policy goals. While the first two goals are overly ambitious, the third goal, on the contrary, seems quite humble. The third goal of the legislation is to assist consumers in comparison shopping among banks for deposit accounts. The truly modest nature of the third goal becomes all the more apparent when one considers the fact that the law does not apply to nonbank competitors for depositors' money, such as mutual funds or insurance companies, Rae Mims, *Fed Gears Up to Release Truth in Savings Regulations*, ABA BANKERS WKLY., Mar. 31, 1992, at 6; 1991 *Hearings*, *supra* note 53, at 29, 42-43 (testimony of The Consumer Bankers Association and the American Banker's Association, respectively), and does not even apply to similar nondeposit account products offered by banks, such as mutual funds and repurchase agreements. The findings clause does not tell us why consumers had difficulty comparison shopping before the law, nor does it tell us what improved comparison shopping will achieve. It merely says that customers could not easily comparison shop before, and now the law assists them in comparison shopping. Read closely, the third goal really amounts to a shorthand statement of the law's substantive provisions. See Rubin, *supra* note 1, at 288.

180. See *supra* notes 32-54 and accompanying text.

181. There may be several ways to explain the disparity between the findings clause and the problems raised during the hearings. One way to view the disparity is as conclusive evidence that the drafter did not engage in an explicit problem-framing analysis, for if the legislative drafter had conducted such an analysis, it would seem logical to memorialize it in the findings clause of the statute. See Rubin, *supra* note 1, at 289. From this interpretation, one might infer the more extreme position that problem solving is not the real purpose of the legislative effort. Such an interpretation, however, would fail to address the dynamic tension between public choice and neo-republicanism that results in a problem-solving exercise, or at least the appearance of one. See *supra* notes 161-73 and accompanying text.

A second plausible explanation for the disparity is that the purpose of the findings clause is not to describe the problem addressed by the legislation, but instead to lay a foundation for federal jurisdiction. In a recent case from the United States Court of Appeals for the Fifth Circuit, the lack of Commerce Clause language in the findings clause of the Gun-Free School Zones Act of 1990, § 1702, 18 U.S.C. § 922(q) (Supp. IV 1992), prevented the application of federal law to an act committed entirely within the state of Texas. *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993). In holding that

without a congressional finding to the contrary, the act of carrying a gun into a Texas school was not within the realm of the Commerce Clause, the court stated: "Neither the act itself nor its legislative history reflect any congressional determination that the possession denounced by section 922(q) is in any way related to interstate commerce or its regulation, or, indeed, that Congress was exercising its powers under the Commerce Clause." *Id.* at 1366. On the other hand, if Congress makes formal findings invoking its power under the Commerce Clause, its enactments routinely will be upheld. *See, e.g.,* EEOC v. Wyoming, 460 U.S. 226, 237 (1983) (upholding Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992)); FERC v. Mississippi, 456 U.S. 742, 754 (1982) (upholding Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.)); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 271 (1981) (upholding Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of 18 U.S.C.)).

In fact, when Congress makes inroads on a substantive area of law traditionally within the domain of the state, the drafter will often include a findings and purpose clause to establish a rationale for the exercise of congressional power based on the Commerce Clause. HIRSCH, *supra* note 12, § 4.2; MEHLMAN & GROSSMAN, *supra* note 12, at 49 ("[T]he findings of fact may disclose the 'intrastate' nature of a regulation of commerce, thereby alleviating potential problems in connection with federal preemption."). That cannot be the case with regard to Truth in Savings, however, because the findings clause does not invoke the magic words of the Commerce Clause or any other constitutional justification.

A third explanation for the disparity might be based on the assertion that the findings clause does not address the problem, but rather serves a formal or traditional role in the legislative process. In this view, the purpose clause plays a ceremonial role in the larger drafting effort, but does not carry any legal significance, nor does it attempt to convey any information about the law's substance. This view holds some validity. Certainly, findings clauses lack legal force and often are written so broadly as to effectively lack meaning. *See* DICKERSON, *supra* note 12, at 287 ("Who can make jurisprudential capital, for example, out of a 329-word 'Declaration of National Environmental Policy' that . . . says no more than 'Hurrah for Nature'?"); *see also* HIRSCH, *supra* note 12, § 4.2. That is not to say that all findings and purposes clauses end up as meaningless generalities completely lacking in candor. For example, the findings and purposes clause of the federal statute dealing with restrictions on garnishment uses some fairly strong language condemning the practice of garnishment: that garnishment "encourages the making of *predatory* extensions of credit," and "has *frustrated the purposes*" of bankruptcy law. 15 U.S.C. § 1671(a) (1988) (emphasis added). On the other hand, the mere fact of the findings clause's existence suggests it has some meaning. A long-established rule of statutory construction states that a provision of a statute will not be read to be without meaning. *General Motors Acceptance Corp. v. Whisnant*, 387 F.2d 774, 778 (5th Cir. 1968) ("[I]t is not to be presumed that the legislature intended any part of a statute to be without meaning."); *Cooper v. Tazewell Square Apartments*, 577 F. Supp. 1483, 1487 (W.D. Va. 1984) ("[M]eaning [must] be given to each word and phrase of the statute"); *Triplett v. Azordegan*, 421 F. Supp. 998, 1002 (N.D. Iowa 1976) ("[A] statute must be construed in such a fashion that no part of it is rendered superfluous and it will not be presumed that a statute contains useless or meaningless words.").

Finally, the meaning of the findings clause may be nothing more than an attempt to justify the law in the language of the neo-republican model. But it might also be something more than that. If the findings clause served only as a blatant attempt to justify the legislation, it could simply state: "The Congress finds that passage of this law will address problems affecting the common good and will make the world a better place." A findings clause this broad and platitudinous would truly lack meaning. But a truly meaningless findings clause like the foregoing would be remarkable. In practice, findings clauses end up somewhere between the truly meaningless broad statement and the truly frank articulation of the proponents' problems. The Truth in Savings' findings clause

of Truth in Savings this way because to do otherwise (that is, candidly state the problems) would have been politically difficult. For instance, to state the problem as bluntly as "banks have unfair economic power over their customers" might not have been politically acceptable—that sounds too Marxist. Not enough legislators would have subscribed to the drafter's underlying normative foundation to explicitly recognize that formulation as a problem. The relatively innocuous statement that the legislation promotes comparison shopping, however, is fairly uncontroversial, if not somewhat misleading.

While watering down the problem to make it politically acceptable may be a fact of political life,¹⁸² from the point of view of legislative methodology, it gets the whole process off to a bad start. Lack of candor on the part of the legislative drafter weakens the entire legislative process.¹⁸³ Without candor, the legal system can never be sure what the real problem is that the law is supposed to correct. Legislators cannot evaluate whether the legislative response called for in the bill is an appropriate remedy. And, perhaps most importantly, we will never know if the law was successful in correcting the problem if we never knew what the real problem was.

In addition to the problems that lack of candor creates for legislative methodology, it raises other concerns as well. Intentionally ob-

reflects this pattern. It contains a substantial degree of specificity, at least by comparison to a truly broad statement. In addition, it appears on its face related to the substance of the law. Therefore, assuming a modicum of candor on the part of the drafter, the findings clause most likely suggests the reasons for the law's existence.

182. From a political point of view, an innocuous problem also carries with it the added benefit of being unlikely to come back to haunt the legislator in the next election. ARNOLD, *supra* note 154, at 71-73.

183. The subject of candor in the legal system has received extensive attention from legal scholars examining the adjudication process. The scholarship reveals the benefits of candor in the judicial process to be at least threefold: (1) candor establishes the moral authority of the bench and the public trust necessary for the judiciary to function, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-37 (1987); (2) candor acts as restraint on judicial power by requiring a reasoned response to a reasoned argument, *id.* at 737-38; and (3) candor makes the law predictable by giving parties notice of the real basis for a court's decision and allowing other courts to follow suit, Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 401 (1989).

Despite the purported benefits of candor in the adjudication process, however, it has not been seen as a universally desirable goal in the adjudication process, and some scholars suggest it may in fact be unobtainable. See, e.g., Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (finding that there may be pragmatic reasons, such as creating the appearance of judicial restraint or decreasing the search time for judges and lawyers, for eschewing "introspective" candor and instead employing formalistic techniques of adjudication); Zeppos, *supra*, at 409-12 (finding that true candor may be impossible because judges may not have the self-awareness to identify what the "real" reasons are for their decisions: "Until we put to rest doubts about our understanding of the judicial decisionmaking process, the calls for judicial candor are premature, if not altogether unrealistic.").

scuring the true purpose of a bill brings a measure of dishonesty into the legislative process.¹⁸⁴ In the great flurry of paper that swirls around Congress, the vast majority of congressional representatives know practically nothing about the bills on the calendar, except perhaps a rough idea of their stated purposes. Furthermore, most members of Congress likely will never even read the bill, never mind have any idea what took place in hearings regarding it.¹⁸⁵ In this way, lack of candor undermines the legislative process because it compromises the honesty and the moral authority of the legislation's proponents.¹⁸⁶

Putting the moral force of candor aside, lack of candor in the identification of a problem also makes life more difficult for those who must interpret, enforce, and comply with the law. This is the point where legislative methodology and statutory interpretation overlap. Candor in the problem-framing phase would tend to make interpreting the enacted statute easier because the world would be on notice of the real reasons for the legislative action.¹⁸⁷ However, if the problems to which the law was addressed have not been fully and honestly identified, but rather have been watered down for political purposes, those actors charged with putting the law into effect will be given an incomplete directive. If the actors who actually implement the law have been misinformed about the law's real purpose, chances are great that the law will not effectively address the real problems it was intended to correct.

In determining the purpose of the law, enforcers, interpreters, and subjects must rely primarily on the text of the statute. Although the

184. Such intentional obfuscation occurs with regularity. Purdy, *supra* note 19, at 89-90. Sponsors try to phrase the title and purpose sections of bills to influence the committee-assignment process, to mislead interest groups or political opponents, and to manipulate the bill's placement on legislative calendars. *Id.* On occasion, the manipulation is more insidious. Reed Dickerson recounts the following episode:

When I was drafting laws for the Pentagon, a high-level lawyer from the National Security Agency (NSA) asked me to 'fuzz up' a draft bill so that, when the particular provision came back to NSA to be administered, they could interpret it to mean what they wanted to have subtly hidden in it. Although such an action would certainly not have been unprecedented, I indicated that I would not participate in any scheme that put blinders on Congress.

DICKERSON, *supra* note 12, at 13.

185. Symposium, *supra* note 1, at 9, 11 (comments of Rep. Christopher Cox).

186. For a discussion of the analogous role of candor in the judicial context, see Zeppos, *supra* note 183, at 401-02. As in the judicial candor situation, lack of candor at the legislative level may result in increased cynicism about the role of legislatures, lack of respect, and ultimately loss of legitimacy. Shapiro, *supra* note 183, at 737.

187. This has been offered by legal commentators as one of the great benefits of judicial candor. Zeppos, *supra* note 183, at 401. Many have raised questions, however, of whether candid opinions provide any greater prediction value than dynamic interpretations of statutes masquerading as originalist opinions. *Id.* at 403.

statutory language is probably the best indicator of the intent of the legislature, the language of the statute has its inherent limitations.¹⁸⁸ Because the enforcers, interpreters, and subjects of the law need to understand what the law really says, those actors may have to look beyond the language of the statute, to its underlying purpose.¹⁸⁹

Despite the desirability of candor for the purpose of articulating a meaningful problem, political realities present a difficult obstacle to the would-be candid problem framer. Candor runs counter to the political realities of the legislative process.¹⁹⁰ Being too candid about one's purpose may only result in the failure to amass a critical amount of support for one's proposal. The legislative proposal must be set forth in somewhat opaque terms in order to keep the bill's prospects for passage alive.¹⁹¹

In addition, because our system requires that legislative actions be justified in the language of the neo-republican ideal, often the true purpose of the law cannot be forcefully stated. The neo-republican ideal requires that the purpose of the law be cast in terms of a benefit to the public interest. If the true purpose of the legislation is to advance the private advantage of an interest group, for instance, the neo-republican ideal prevents the drafter from being completely forthright about the law's purposes. Therefore, even if a conscien-

188. Given the inevitable differences of opinion that will arise when several people read the same text, we must provide some way for them to discuss the meaning on common ground so that they might persuade one another of the right view. Agreeing what the statute was supposed to achieve helps establish that common ground. Chow, *supra* note 175, at 791-95; *see also* Alienikoff, *supra* note 9; Eskridge, *supra* note 9.

189. Although the exercise of determining the purpose of a statute smacks of an archeological investigation in the originalist tradition, *see* Alienikoff, *supra* note 9, at 22-32, even scholars who propose a dynamic approach to statutory interpretation consider the purpose of the statute to be relevant in the development of the statute's interpretation. *See, e.g.*, Eskridge, *supra* note 9; Eskridge & Frickey, *supra* note 9; Rubin, *supra* note 9.

190. *See supra* note 184. Sometimes lack of candor in bill drafting is employed for noble ends, however. The most celebrated case of intentional manipulation of a draft bill's purpose and title was the bill that eventually became the Civil Rights Act of 1964. It was drafted somewhat differently for each chamber of Congress so that in the House it would be referred to the sympathetic Judiciary Committee, chaired by Representative Emanuel Celler of New York, instead of the unsympathetic Interstate and Foreign Commerce Committee, chaired by Representative Oren Harris of Arkansas. In the Senate, the bill was drafted in such a way as to ensure its referral to the Commerce Committee, chaired by Senator Warren Magnuson of Washington, instead of to the Judiciary Committee, chaired by Senator James Eastland of Mississippi. KERNOCHAN, *supra* note 26, at 15-16; OLESZEK, *supra* note 149, at 86-87. Although changes in the House and Senate rules since the passage of the Civil Rights Act of 1964 affect the procedures for the referral of bills, they do not eliminate the incentive to manipulate the referral process through crafty drafting. CURTIS & WESTERFIELD, *supra* note 3, at 90-91; KERNOCHAN, *supra* note 26, at 15-16.

191. Angus MacIntyre, *The Multiple Sources of Legislative Ambiguity: Tracing the Legislative Origins of Administrative Discretion*, in ADMINISTRATIVE DISCRETION AND THE IMPLEMENTATION OF PUBLIC POLICY 72-74 (Douglas Shumavon & H. Kenneth Hibbeln eds., 1986).

tious legislative drafter were to identify the problem honestly, she would have to confront the political realities that accompany problem framing, and craft a politically acceptable formulation of the problem.

C. Lack of a Sophisticated Model

In order to identify problems and propose solutions thereto, a drafter must have a mental model of how the real world works. Using her mental model, the drafter can test her approaches to the problem as she progresses through the drafting stage. Her model should also permit her to project how the world will work after the legislation has been enacted. Mental models may be sophisticated or simplistic. In the case of Truth in Savings, the model employed by the drafter appears to have been relatively simplistic.

From the language in the findings section, the predominant model employed by the drafter was one of perfectly competitive markets, from the school of neo-classical economics.¹⁹² The purpose of the statute was based on the traditional regulatory goal of correcting market failures.¹⁹³ Market failures are those situations that develop from time to time that tend to push our economy away from the result that would obtain under a purely competitive market system.¹⁹⁴ The findings contained in the legislation invoke the language of correcting market failure by employing terms such as "economic stability," "enhanced competition," and "informed decisions."¹⁹⁵

Within the framework of the market failure model, however, the drafter of Truth in Savings committed some methodological errors.

192. A market is said to operate under perfect competition when the following four conditions are met: (1) there exists in the market enough buyers and sellers such that no one buyer or seller may influence prices; (2) the products sold in the market are fungible; (3) no barriers to entry or exit exist in the market; and (4) buyers and sellers have perfect information. Finding an actual market that exhibits these characteristics presents a daunting challenge. Few, if any, actual markets meet the definition of perfectly competitive markets. WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 418-19 (1979).

193. THOMAS W. DUNFEE & FRANK F. GIBSON, *LEGAL ASPECTS OF GOVERNMENT REGULATION OF BUSINESS* 7-12 (3d ed. 1984); A. LEE FRITSCHLER & BERNARD H. ROSS, *BUSINESS REGULATION AND GOVERNMENT DECISION-MAKING* 41-42 (1980).

194. Traditionally, economists have recognized three specific departures from perfect competition as "market failures": (1) imperfect information; (2) natural monopoly; and (3) externalities. Imperfect information is a market failure because perfectly competitive markets require complete, cost-free, information to function. Without complete information, consumers may make inefficient decisions that will result in an inefficient mix of goods in the market. Natural monopolies are those businesses for whom the laws of supply and demand permit but a single efficient producer. Externalities are the costs or benefits imposed on third parties as a side effect of a given transaction, which are not reflected in prices. For a general discussion of these market failure problems, see ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* 36-39 (1983).

195. See *supra* note 178 and accompanying text.

Most importantly, she failed to define the market. Economic markets are usually defined in terms of geographic dimensions and product line dimensions.¹⁹⁶ Even if one takes the geographic dimension of the market corrected by Truth in Savings to be the entire United States, no effort was made to give the market a meaningful product line dimension.

One possible product line would include all deposit-like investment products where the potential exists for sellers to take advantage of relatively unsophisticated savers. This market would include the product line identified by Truth in Savings itself—accounts at depository institutions as defined in section 19(b)(1)(A) of the Federal Reserve Act¹⁹⁷—but would also include other products with similar attributes, such as money market mutual funds, insurance annuity contracts, and repurchase agreements. While such a product line dimension makes sense, it is not the dimension adopted in the legislation. From a policy perspective, it is difficult to rationalize the decision not to include these other products within the definition of the market. A political reason, however, clearly exists for leaving those products out. As Representative Torres candidly stated, those products probably should have been a part of the law, but to include them would have meant referring the legislation to another committee.¹⁹⁸

Given that political realities prevented a meaningful definition of the relevant market, supporters could still justify Truth in Savings as an attempt to correct a market failure in the market for deposits within the banking industry alone. A failure exists in this market, proponents could argue, because of imperfect information in the relationship between banks and their customer. Because the theoretically perfect market depends on complete information to function properly, a comprehensive disclosure statute could be seen as promoting this aspect of the theoretical model.¹⁹⁹

196. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); U.S. Dep't of Justice Merger Guidelines §§ 2.1, 2.3, 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984).

197. Truth in Savings Act, § 274, 12 U.S.C. § 4314 (Supp. V 1993).

198. 1991 Hearings, *supra* note 53, at 1 (comments of Rep. Esteban Torres, Chairman, Subcommittee on Consumer Affairs and Coinage).

I understand there are concerns that the subcommittee print does not apply to other financial service providers, which compete with depository institutions. . . . However, to broaden the scope of the legislation may create jurisdictional problems which could delay the passage of the bill, and obviously this is of tremendous concern to myself and the members of the subcommittee.

Id.

199. Correcting failures of the market to supply information is a traditional justification for economic regulation. BREYER, *supra* note 130, at 26-28. This approach has been pursued with great vigor in the area of securities regulation. See, e.g., John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717

While the market failure rationale may be a coherent argument in favor of Truth in Savings, it is not necessarily a convincing one. It fails to convince because it accepts the "more perfect market" goal without determining its feasibility (or even its desirability). Perfect markets are very rare and exist in few sectors of economic life.²⁰⁰ Certainly, the financial services market falls far short of the conditions necessary for the perfectly competitive model.²⁰¹ Given that the best allocation of resources, as represented by the attainment of the conditions of pure competition, will not be achieved in the financial services market, the general theory of second best states that no reason exists *a priori* to believe that fulfilling the remaining conditions will improve the overall efficiency of the system.²⁰² In such a situation, one cannot be sure that correcting the remaining conditions will result in increased, rather than decreased, allocative efficiency.²⁰³ Consequently, without an empirical study to the contrary, no determinate argument can be made that increased deposit account disclosure is better, in an economic sense, than the status quo.²⁰⁴

(1984). But increased disclosure is not always seen as a value-neutral improvement to the operation of an efficient market. For instance, disclosure in the securities industry has been attacked as ineffectual and for benefiting one group at the expense of others. Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

200. 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF FREE PEOPLE* 65-66 (1979).

201. The market for bank deposits fails to achieve the conditions of perfect competition: (1) while the products sold in the market are similar, they are not fungible; (2) big players can exert strong influence on market prices even though there are many players in the market; and (3) there are extremely high barriers to entry. The arguable lack of perfect information only adds but one small brush stroke to a picture of a market that is clearly not perfectly competitive.

202. The general theory of second best states that if the best allocation of resources depends on the attainment of a given set of conditions, but the conditions are unattainable, there is no way to know—short of performing an exhaustive empirical study—whether attaining the rest of the ideal conditions will improve the allocative efficiency of the system or make it worse. BREYER, *supra* note 130, at 16-17; Herbert Hovenkamp, *Antitrust Policy and the Social Cost of Monopoly*, 78 IOWA L. REV. 371, 377 (1993); Richard S. Markovits, *The Case for "Business as Usual" in Law-and-Economics Land: A Critical Comment*, 78 IOWA L. REV. 387 (1993).

203. Markovits, *supra* note 202, at 388.

204. One could say that the theory of second best proves too much and that Congress should refrain from adopting any economic legislation because of the complexities of making it effective. The theory does not require such an extreme conclusion, however, but rather insists on the more modest position that when economic regulation is proposed it ought to be consistent with a sophisticated understanding of how things actually work and how they will work after enactment. Regulatory options should not be dictated by a dearly held model, such as the model of perfectly competitive markets. Instead, we should continually question and test the premises on which our models are based to ensure the models' continued usefulness in understanding the real world. We must recognize that our models represent a theory about reality, not reality itself. Blind adherence to a model results in skewed perception because we will tend to rationalize reality in terms of the

Another reason to question the value of the perfectly competitive market model as a guide for developing banking regulation is that our entire system of banking regulation tries to *prevent* unfettered competition in the banking industry. The financial services markets in the United States are not perfectly competitive by design—we have made a public policy choice to trade off the benefits of competition for the benefits of a more stable banking system. Our national banking policy values stability.²⁰⁵ The national experience with free competition in the banking industry during the nineteenth century was not a pleasant one, and we do not want to repeat the experience.²⁰⁶ A moment's reflection makes clear that perfect competition in the financial market is not only unattainable, it is probably undesirable as well, as increased competition tends to result in less stability. Trying to create perfectly competitive markets may result in a cure worse than the disease.²⁰⁷

Accordingly, adopting an overly simplistic model of how financial markets operate blinded the drafter of Truth in Savings to alternative approaches.²⁰⁸ The history of Truth in Savings reveals no serious attempt to address the problems through any means other than a com-

model instead of evaluating the model in terms of reality. For an interesting discussion on this topic, see Chow, *supra* note 175, at 777-80.

205. See NICHOLAS A. LASH, *BANKING LAW AND REGULATIONS: AN ECONOMIC PERSPECTIVE* 23 (1987).

206. On the good side, the free banking era was marked by almost pure competition: barriers to entry were low, there were many participants in the banking market, and government interference was kept to a minimum. Gordon, *supra* note 36, at 56. On the bad side, the era was marked by frequent bank failures, unstable money, and widespread fraud. KERRY COOPER & DONALD R. FRASER, *BANKING DEREGULATION AND THE NEW COMPETITION IN THE FINANCIAL SERVICES INDUSTRY* 46 (1984); Gordon, *supra* note 36, at 56, 58.

207. Considering the obvious shortcomings of the drafter's economic model, one must question the sincerity and candor of the economic justification offered in the findings clause. The drafter may have been attempting to justify Truth in Savings as economic legislation only to obscure its true purpose as social legislation. Although we think of disclosure statutes primarily as a method of promoting efficient markets, they are often employed for the purpose of outlawing certain behavior. BREYER, *supra* note 130, at 161.

In the area of banking law, for instance, the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-2809 (1988 & Supp. IV 1992), aims to prevent lenders from "red-lining" certain neighborhoods. *Id.* at 161-62. Truth in Savings may be seen as such a piece of social legislation. The witnesses identified many practices that they considered unethical or unfair. Although the statute speaks in the relatively neutral language of "disclosure," with the goal of making markets more competitive, its underlying purpose aims to force banks to expose their arguably unethical or unfair practices to the light of day and, by doing so, create an incentive for them to stop employing those practices. While this social goal may be noble, once again it raises the concerns that flow from lack of candor in the definition of the problem. See *supra* notes 181-85 and accompanying text. If the problem the legislation sought to address was the unfair practices of banks, that should have been the stated purpose of the law, not mere disclosure.

208. See *supra* notes 116-40 and accompanying text.

prehensive disclosure requirement. By failing to challenge her underlying model, the drafter committed a serious methodological mistake.²⁰⁹

D. The Failure to Distinguish Between Causes and Conditions

A problem solver must be careful to identify the problem in light of causes and conditions.²¹⁰ The problem solver must undertake two inquiries. First, she must examine the problem to discover how the problem is caused. Second, she must determine whether the cause of the problem can be corrected through legislation or whether it is an uncorrectable condition of life on earth.²¹¹ Without separating causes and conditions, the legislature may waste valuable resources addressing phenomena that cannot be corrected or may address phenomena that are not problems in their own right as much as they are symptoms of larger problems. Failure to examine problems critically to en-

209. The drafter's mental model limited the legislative response to measures that would correct the market failure to the exclusion of other alternatives. This limitation made for a false choice in the policy decision between an imperfect market and an attempt at a more perfect market. As Nobel-prize winning economist Friedrich Hayek has observed, "The test should not be the degree of approach towards an unachievable result, but should be whether the results of a given policy exceed or fall short of the results of other available procedures." 3 HAYEK, *supra* note 200, at 67.

210. Seidman, *supra* note 5, at 62. By identifying the true causes of a problem, we may avoid Thoreau's observation that "[t]here are a thousand hacking at the branches of evil to one who is striking at the root." HENRY DAVID THOREAU, WALDEN 68 (Modern Library ed. 1937).

211. An example of causes and conditions illustrates the point. Assume a migrating species of bird winters in Louisiana and flies to the Canadian tundra to mate and rear its young. As constituents in the bird's flyway notice a decrease in the population of the species, they press Congress for action. A drafter confronted with the task of preparing legislation must determine how to correct the problem of decreasing bird population. Employing her sophisticated model of the problem, she solicits the expert advice of ornithologists, wildlife experts, hunters, and others. She commissions an empirical study. After doing her homework, she concludes that the observed decrease in bird population is caused by a number of factors, most importantly are the loss of mating habitat due to hydro-electric development in Canada and the increase in predators resulting from the return of the timberwolf. Before she can formulate a response to the problem, she must appreciate the conditions within which this phenomena occurs, including such things as these: (1) the birds fly from the arctic to the Gulf coast; (2) the wolf is increasing in numbers and preys on the nesting birds; (3) Canada is a sovereign nation over which the U.S. Congress has no direct control. These conditions are facts of life. She must craft her response to address the cause of the problem, but recognize the limits imposed by the conditions. Her response to the problem must take both causes and conditions into account. If the cause of the problem is lack of mating habitat in Canada, a law that prohibits hunting the birds in Louisiana will not correct the problem. It might ameliorate it a little, but will not correct it. The real solution, however, requires action in Canada. The legislative response must be crafted in such a way to get Canadian cooperation on the problem.

sure that the solution reaches the cause often results in legislative responses that are mere band-aids.

In the case of Truth in Savings, for example, the problems complained of in the hearings may actually have been better characterized as symptoms of larger problems. The changes in the relationship between banks and their customers may in large part have been driven by economic changes in the financial services marketplace. Banks had to find ways to cut costs and increase noninterest income.²¹² The problems complained of in the hearings may have been symptomatic of changes facing banks in the competition for deposits. If this was the case, the proper way to address the "problems" would have been to address their underlying cause: the changes in the financial services industry. On the other hand, the problems may have been symptomatic of a much more insidious problem: the banking industry's having too much power in the economy and misusing that power.²¹³ If this was the case, the appropriate response should have targeted that "cause." In either event, the drafter never attempted to determine whether the problems complained of were problems in their own right or symptoms of something bigger.

When developing legislation, drafters must appreciate that they cannot control everything that contributes to the cause of a problem. Certain things are beyond human control—such as the laws of physics, human nature, and the weather—and must be viewed as conditions of life on earth that the drafter must accept as a given.²¹⁴ Her legislative response to a problem must seek to correct the *cause* of the problem, while understanding that existing conditions may not be

212. See *supra* note 39 and accompanying text.

213. The illustration of possible analyses of the Truth in Savings problems points out that the separation of causes and conditions may in fact be another normative judgment that must be made in the legislative process. Seidman, *supra* note 5, at 62.

214. In addition to these unchangeable conditions of life on earth, the drafter must also consider values to be conditions. Societal values can change relatively quickly. Things identified as problems today may not be considered problems 10 years from now, and, conversely, things that we have not yet identified as problems may in 10 years time be very pressing issues. For an example of how a nonproblem can change into a problem as a result of changing societal attitudes, consider the experience of the McDonald's hamburger chain with polystyrene foam containers. When first introduced, the styrofoam clamshell design was hailed as an efficient, cheap, and effective means of keeping fast food warm and protected. As societal concerns about the environment—and especially about municipal landfills—increased, the styrofoam clamshell container came to be seen as a problem by the average citizen (it may or may not have been a real problem, but it was perceived as one). Eventually McDonald's returned to paper-packaging in light of public pressure. See PETROSKI, *supra* note 13, at 220-25. For this reason, problems, once identified, ought to receive continuing scrutiny. Truth in Savings existed in bill form from 1968 through 1991. That time period saw a revolutionary change in the financial services market and in the attitudes of the typical consumer of financial services. The Truth in Savings bill, however, showed little response to these changing conditions.

subject to change. In the context of Truth in Savings, the conditions that the drafter might have identified could have included: (1) banks are profit-oriented enterprises and will not voluntarily give up an advantageous position; (2) consumers lack sophistication; (3) consumers rarely read or understand business or legal documents; and (4) consumers have a choice of financial services providers who will provide savings account products. Assuming Congress could identify what problem it sought to address, an appropriate version of Truth in Savings would have to target its efforts at the cause of the problem (whatever that cause had been determined to be), while taking cognizance of the conditions under which the legislation would be implemented. An appropriate response would address the causes, while accepting the conditions as given. There is no evidence that Truth in Savings was ever subjected to this sort of analysis.

E. Lack of Appreciation for the Problem Framers' Power

Problem framing may receive short shrift in the legislative process because Congress fails to appreciate the problem framer's significant role in the development of legislation.²¹⁵ Although the legislative drafter is not free to draft legislation to whatever whim the sponsor may desire,²¹⁶ how she frames the problem may have a great effect on

215. On the other hand, the lack of a more rigorous problem-framing step may be due to an intense appreciation of the problem framer's power and a reluctance on the part of problem framers to give up that power.

216. The problem framer must conform the problem to long-standing political and legal conventions, including such considerations as:

1. *Substantive Constraints.* The Constitution limits Congress' power to make laws in several substantive respects, such as prohibiting ex post facto laws and bills of attainder, U.S. CONST. art. I, § 9, cl. 3, and titles of nobility. *id.* cl. 8. Additionally, the amendments to the Constitution place certain subjects off limits, including, for example, laws establishing religion or prohibiting the free exercise thereof, or laws abridging free speech or the press or the right of the people to peaceably assemble. *Id.* amend. I. Finally, the Supreme Court has identified some substantive areas—such as the right to privacy, *Roe v. Wade*, 410 U.S. 113 (1973), and the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969)—that, while not specifically articulated in the Constitution, nevertheless are protected from unfettered legislation.

2. *Consistency with Traditional Public Policy Goals.* The problem and the solution identified by the drafter must be consistent with, or at least capable of being rationalized in terms of, the traditional public policy goals of federal legislation. In the area of banking legislation, the regulatory goals include such matters as: (1) providing a safe and sound banking system; (2) preventing concentration of economic power; (3) allocating credit to the most socially desirable uses; (4) protecting consumers; and (5) providing a financial system that can facilitate the conduct of monetary policy. See LASH, *supra* note 205, at 22-25; Stephen J. Friedman & Connie M. Friesen, *A New Paradigm For Financial Regulation: Getting from Here to There*, 43 MD. L. REV. 413, 446-54 (1984).

3. *Federalism Issues.* The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Although Congress has

the bill's evolution. A skillful drafter can frame a problem in a way that dictates a particular solution. Even if the problem as framed does not determine the outcome of the legislative process, it often has great staying power and can shape the course of future negotiations over the bill's contents.

The powers enjoyed by the problem framer, however, while considerable, will not always carry the day. The problem framed by the drafter will be subject to the powers of the agenda setter, who also has a tremendous impact on the outcome of the legislative process. In addition, political forces inside and outside the legislature may ultimately be responsible for passing or preventing the legislation.

found justification for almost any activity it has desired to regulate based on the commerce clause, *see, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971) (holding that local "loan sharking" operation can be regulated by federal government through commerce clause because loan sharking in its national context affects interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that barbecue restaurant subject to Civil Rights Act of 1964 because it served food that was moved in interstate commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that establishment providing accommodation for travellers deemed to affect "commerce"), nevertheless, every federal legislative venture into substantive areas previously governed by state law needs to address the issue of federalism. To argue otherwise would suggest that the Tenth Amendment has no meaning. In fact, the Tenth Amendment may have virtually no meaning, as it has long been held to merely state "but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941).

In light of the current Court's conception of federalism, however, the Tenth Amendment may enjoy a resurgence of authority. *See New York v. United States*, 112 S. Ct. 2408 (1992). In the banking field, federalism has special meaning because of our unique dual banking system. The differences between the state and federal systems of bank regulation have led to a competition of sorts between them. Some commentators have lauded this regulatory competition as a method that reduces regulation to the optimum point consistent with safe and sound banking practices. *See* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, in *REGULATION OF AMERICAN BUSINESS AND INDUSTRY 1* (Franklin R. Edwards ed., 1979). Other commentators have been less deferential to the dual banking system, claiming that the differences between state and federal regulation are more apparent than real. *See* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 *CORNELL L. REV.* 677, 678 (1988).

4. *Coherence.* Finally, the legislative drafter should strive for coherence between the bill she drafts and the overall body of statutory and regulatory provisions covering the topic. For instance, if the larger legislative agenda envisions reduced regulation on banks as a method to stimulate business lending, *see Agency Actions to Reduce the Negative Impact of Regulations on Credit Availability: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 103d Cong., 1st Sess. 60, 61-62 (1993) (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve System), *reprinted in* 79 *FED. RES. BULL.* 781, 781 (1993), a law increasing the regulatory burden should not be passed as it fails the requirement of coherence. Coherence requires some degree of coordination between the legislative branch and the regulatory agencies. GARTEN, *supra* note 132, at 64-66.

1. Significance of Framing Effects

The artful problem framer possesses significant powers. How she frames the problem can strongly influence the actions of those who must make decisions based on the problem as framed.²¹⁷ In one famous example of the power of framing effects, subjects were asked to choose between two different cancer treatments, radiation or surgery. The subjects were given information about the probability of living through each treatment. When the expected outcomes of the two procedures was stated in terms of *survival* rates, subjects chose surgery. When the exact same information was restated in terms of *mortality* rates, however, significantly more subjects chose radiation.²¹⁸

The problem framer, therefore, has an opportunity to influence decisions of fellow legislators by framing the problem artfully. Although the framing effect may be just a special case of the requirement that the underlying normative foundation on which a problem rests be consistent with the normative values of a critical mass of legislators,²¹⁹ it appears to be more than that. Framing effects reflect something

217. For instance, if a state legislature takes up debate about a bill dealing with hostile corporate takeovers and the bill's sponsor has framed the issue as "unscrupulous out-of-state corporate raiders are making millions at the expense of our state's shareholders, management, and employees," that description of the problem will strongly influence the direction of the public debate on the topic and will, in large part, dictate a solution to the issue that penalizes hostile offerors. Using loaded language can help a problem framer obtain a given result, but, even on a less blatant level, research has shown that framing effects influence the decisions of otherwise rational people. See Sovern, *supra* note 69, at 30-33.

218. HEAP ET AL., *supra* note 142, at 39-40 (citing Barbara J. McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259, 1259-62 (1982)). In summary, the researchers presented the test groups with a hypothetical choice between two treatments for cancer: either surgery or radiation. McNeil et al., *supra*, at 1260. The first group considered the following information in the following form:

Surgery: Of 100 people having surgery 90 live through the postoperative period, 68 are alive at the end of the first year and 34 are alive at the end of five years.

Radiation Therapy: Of 100 people having radiation therapy all live through the treatment, 77 are alive at the end of one year and 22 are alive at the end of five years.

Id. Only 18% of the first group preferred radiation therapy. *Id.* at 1261. In contrast, 44% of the second group chose radiation when exactly the same information was presented as follows:

Surgery: Of 100 people having surgery 10 die during surgery or the postoperative period, 32 die by the end of the first year and 66 die by the end of five years.

Radiation Therapy: Of 100 people having radiation therapy, none die during treatment, 23 die by the end of one year and 78 die by the end of five years.

Id. The researchers found a pronounced framing effect whether posing the choice to clinical patients or to doctors. HEAP ET AL., *supra* note 142, at 40.

219. See *supra* notes 181-82 and accompanying text.

deeper in the decisionmaking process where otherwise rational decisionmakers can be subconsciously manipulated by the force of words.²²⁰

2. The Resiliency of the Original Problem

The problem framer also possesses the power to set the stage upon which discussion of the issue will take place for years to come. She can exploit this power because legislative proposals display remarkable resiliency from one Congress to the next.

Truth in Savings provides an extreme example of the resiliency of a bill. A proposal for federal legislation mandating comprehensive disclosure of deposit account terms, the basic idea of Truth in Savings, was first introduced in the 91st Congress, in 1968.²²¹ It finally passed in the 102d Congress, in 1991. Despite the fact that the financial services industry changed dramatically between 1968 and 1991, the proposed Truth in Savings legislation remained remarkably static.²²² In

220. Framing effects have been likened to the linguistic equivalent of optical illusions. Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 399 (1990).

221. Bonfanti, *supra* note 49, at 12.

222. The basic Truth in Savings idea has shown amazing resiliency. In the 92d and 93d Congresses, Senator Vance Hartke of Indiana sponsored bills that would have required the disclosure of key terms in the interest calculation and regulated the methods by which the accounts could be advertised. *Id.* at 12-13. The elements of Senator Hartke's proposals formed the core of the Truth in Savings idea through its various reincarnations until it was finally passed in 1991. Versions of Truth in Savings were introduced in the 94th Congress (§ 107 of the Financial Institutions Act of 1975, S.1267, contained Truth in Savings provisions, as did H.R. 14), *id.* at 14, the 95th Congress (H.R. 829 required the disclosure of key terms and fees), *id.*, and the 96th Congress (H.R. 3461 was essentially the same as H.R. 829, introduced in the previous Congress), *id.* After a brief hiatus, Truth in Savings resurfaced in the 98th Congress as H.R. 5232. That bill died in committee, but was reintroduced in the 99th Congress as H.R. 2282. In the 99th Congress, Truth in Savings was reported favorably out of committee with an amendment in the form of a substitution combining Truth in Savings with credit card disclosure. The bill emerged from committee as H.R. 5613 entitled the "Truth in Savings and Credit Card Application Act." H.R. 5613 passed the House by voice vote on October 7, 1986, 132 CONG. REC. H9313, 9313 (1986), but was not considered by the Senate, so it did not become law. Continuing its arduous journey, Truth in Savings reappeared in the 100th Congress as H.R. 176. The bill was unanimously passed by the House on June 29, 1987. 133 CONG. REC. H5761, 5761 (1987). Later, but before going to the Senate, the bill was included in H.R. 5094, The Depository Institutions Act of 1988, as subpart E of Title IV—consumer protection provisions. It did not pass Congress. It reappeared in the 101st Congress, where it was reintroduced by Representative Lehman as H.R. 736.

The bill was passed by the House and a similar bill was passed by the Senate as part of the Money Laundering Act, but once it again failed to get enacted, this time because the conference committee failed to produce a conference report. HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, TRUTH IN SAVINGS ACT: REPORT TO ACCOMPANY H.R. 2654, H.R. DOC. NO. 202, 102d Cong., 1st Sess. 8 (1991). In the 102d Congress, Representative Lehman again introduced Truth in Savings. His bill was numbered H.R. 447. Similar provisions were also contained as part of a larger banking bill, H.R. 6. The House Banking

its twenty-three years on Capitol Hill, the proposed legislation never changed to take into account the changing nature of the financial marketplace, such as the rise of alternative deposit products available from mutual funds, insurance companies, and credit unions.

The resilience of the originally proposed approach perhaps owes less to the prescience of its drafters than it does to a fact of legislative life: the first version of the problem and its proposed solution often are the only articulations seriously considered during the legislative process.²²³ Of course, this resiliency provides a glaring example of bad problem-solving methodology because, over twenty-three years, the problem—whatever it was—must have changed somehow, given the dramatic changes in the financial services industry during that time. The response, however, did not change in step.

In light of the fact that the original problem possesses the trait of resiliency, framing the original problem correctly takes on great importance. The basic decisions made in the original drafting effort—especially the framing of the problem and the identification of a response—can make a lasting impression on the final version of the bill.²²⁴

While the problem framer has real powers, she exercises them in a larger arena where other forces and players affect legislative fortunes. Specifically, the agenda setter may be able to override some of the problem framer's inherent power by manipulating procedure or by acting as a second problem framer. Additionally, political forces both within the institution and from outside force individual legislators to act in particular ways.

Finance and Urban Affairs Committee's subcommittee on Consumer Affairs and Coinage conducted a hearing on both H.R. 447 and the Truth in Savings provisions of H.R. 6. After hearing testimony, the subcommittee marked up the bills, and Representative Torres, chairman of the subcommittee, introduced the revised version of Truth in Savings as H.R. 2654. *Report 102-202 to Accompany H.R. 2654, Truth in Savings Act, reprinted in* Fed. Banking L. Rep. (CCH) No. 1469, pt. 2, at 158-59 (Nov. 13, 1992). Eventually, H.R. 2654 was incorporated into the Federal Deposit Insurance Corporation Improvement Act of 1991, passed both chambers, and was signed into law by President Bush on December 19, 1991.

223. Even if the problem framer specifically labels the early draft a "springboard" for discussion, it is likely that subsequent changes in the proposal will take the form of revisions to the original proposal. As legislators get caught up in their own negotiations on a particular bill, they naturally tend to address new concerns by adding or deleting provisions from the bill that is on the table. Rubin, *supra* note 1, at 279. The Truth in Lending Act provides an excellent example of this phenomenon. *Id.* at 268-69.

224. Purdy, *supra* note 19, at 98.

3. The Agenda Setter's Procedural Power

Scholars have demonstrated the power of the legislative agenda setter to manipulate the outcome of the legislative process.²²⁵ The experience of Truth in Savings in both the House and the Senate in the 100th Congress illustrates the power of the agenda setter quite clearly. In 1988, Congress was engaged in the very serious and difficult work of revamping the banking system. As commentators had been pointing out for years, the legal distinctions between commercial and investment banks, thrifts, insurance companies, and securities firms made little sense from an economic point of view because those firms had the capacity to deliver very similar products to the public.²²⁶ Many commentators believed that the existing structure of bank regulation was a burden that put U.S. banks at a competitive disadvantage.²²⁷ In the 100th Congress, federal law was supposed to catch up with market realities and allow banks freer competition across product lines. The bills under consideration would have allowed banks to participate in the securities and insurance business.

In 1988, any bill granting banks securities powers had to get by two very powerful committees in the House of Representatives: the Banking, Finance, and Urban Affairs Committee—chaired by Fernand St. Germain of Rhode Island—which had jurisdiction over banking, and the Energy and Commerce Committee—chaired by John Dingell of Michigan—which arguably had jurisdiction over any legislation dealing with securities or insurance. Representative St. Germain²²⁸ and many on his committee²²⁹ were widely considered antagonistic to the idea of granting the banking industry wider powers. Any benefit to the banking industry from his committee would come at great cost. In

225. See, e.g., Farber & Frickey, *supra* note 151, at 901-06; *infra* notes 232-35 and accompanying text.

226. See, e.g., *Legislative Proposals to Restructure Our Financial System: Hearings on S. 1886, S. 1891, and S. 1905 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 81, 82 (1987) (statement of Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System), reprinted in 74 FED. RES. BULL. 91, 92 (1988) [hereinafter *Greenspan Statement*]; COOPER & FRASER, *supra* note 206; Richard C. Aspinwall, *On the "Specialness" of Banking*, 7 ISSUES IN BANK REG. 16 (1983); Bevis Longstreth, *Glass-Steagall: The Case for Repeal*, 31 N.Y.L. SCH. L. REV. 281 (1986); Curtis J. Polk, Chapter, *Banking and Securities Law: The Glass-Steagall Act — Has it Outlived its Usefulness?*, 55 GEO. WASH. L. REV. 812 (1987); William J. Shafer, Note, *Glass-Steagall Reform: It's Time to Replace the Crumbling Wall*, 14 J. CORP. L. 973 (1989); Kelly A. Zazella, Note, *Beyond "The Wall": The American Financial System and Glass-Steagall Reform*, 62 ST. JOHN'S L. REV. 67 (1987).

227. *Greenspan Statement*, *supra* note 226, at 91-92. For a general discussion, see Friedman & Friesen, *supra* note 216, at 414-42; H. Robert Heller, *International Economic Challenges to American Banking*, 9 ANN. REV. BANKING L. 323 (1990).

228. Robert M. Garsson, *Senate to Begin Hearings on Consumer Measures*, AM. BANKER, Sept. 8, 1988, at 22.

229. *Id.*

the past, Representative St. Germain had been viewed as one who piled on consumer regulations to banking legislation to make it less palatable to the banking industry or as the price the banking industry had to pay for expanded powers.²³⁰

As committee chair, St. Germain controlled his committee's agenda and, thus, had a great deal of power over the outcome of committee action.²³¹ As modern public choice scholars have amply demonstrated, control of the agenda and the procedures employed in the decisionmaking process can determine the outcome.²³² If the agenda develops through an open process whereby each legislator can propose an alternative, then the outcome of majority rule may wander anywhere because of preference-cycling problems.²³³ On the other hand, if one person controls the agenda, that person has sufficient

230. Clifford L. Brody, *What Happens if the Senate Goes Democrat?*, AM. BANKER, Oct. 21, 1984, at 15; Jay Rosenstein & Lee J. Miller, *Protection Push*, AM. BANKER, July 23, 1984, at 2.

231. OLESZEK, *supra* note 15, at 93.

232. See, e.g., HEAP ET AL., *supra*, note 142, at 249-58; Easterbrook, *Statutes' Domains*, *supra* note 9, at 547; Farber & Frickey, *supra* note 151, at 38-42.

233. Kenneth A. Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 10 (1985). An example drawn from the general principles developed in PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 65-71 (1986), and from an example used in JOHN ALLEN PAULOS, *BEYOND NUMERACY: RUMINATIONS OF A NUMBERS MAN* 262-64 (1991), illustrates the significance of voting procedure in determining outcome. Consider a 55-member committee charged with closing one military base from a list of five possible bases. The states with the bases are Louisiana (L), Michigan (M), Nevada (N), Oregon (O), and Pennsylvania (P). Based on the political consequences to each of them as elected individuals, the committee members have ordered their individual preferences for base closing as follows, with the state listed first as the one they would most like to close and the others listed in decreasing order of preference:

18 members rank preferences:	(1) L	(2) O	(3) P	(4) N	(5) M
12 members rank preferences:	(1) M	(2) P	(3) O	(4) N	(5) L
10 members rank preferences:	(1) N	(2) M	(3) P	(4) O	(5) L
9 members rank preferences:	(1) O	(2) N	(3) P	(4) M	(5) L
4 members rank preferences:	(1) P	(2) M	(3) O	(4) N	(5) L
2 members rank preferences:	(1) P	(2) N	(3) O	(4) M	(5) L

Based on these stated preferences, it is impossible to determine which state's military base will be closed without also knowing the voting procedure that will be employed to aggregate the preferences. The outcome of the group decisionmaking process will hinge entirely on the voting procedure, as the following discussion demonstrates.

Those favoring closure of the Louisiana base will argue that a plurality method of voting should prevail in which the state receiving the most first-preference votes is selected. Under our hypothetical, Louisiana would be selected, as more members (18) have listed it as their first choice than any other state.

The representatives from Louisiana and their political allies will argue for any method of voting other than the plurality system. They might propose a run-off vote between the two most-preferred states. In our example this would result in a run off between Louisiana, which received 18 first-preference votes, and Michigan, which received 12 first-preference votes. Under this system, Michigan would be selected, because in a vote between Louisiana and Michigan only 18 members would prefer to close Louisiana instead of Michigan, while 37 members would prefer to close Michigan over Louisiana.

opportunity to manipulate the voting procedure to produce a desired result.²³⁴ Thus, the agenda setter can effectively trump the efforts of the legislative drafter by manipulating the outcome of the voting process. Regardless of how artfully the drafter has framed the problem, if it does not gain the support of the agenda setter, it will have difficulty passing.²³⁵

The Michigan representatives and their supporters can be expected to resist this method of voting. They might suggest a different system of counting votes, such as successive rounds of eliminating the state that received the fewest first preferences. The state that received the fewest first-preference votes in the first round of voting (Pennsylvania, in our hypothetical) would be eliminated, and all of the remaining preferences would be adjusted accordingly. This would yield the following result: 18 votes for Louisiana, 16 for Michigan, 12 for Nevada, and 9 for Oregon. In the next round, the state with the fewest first preferences from the previous round (Oregon) would be eliminated and the preferences again adjusted. By proceeding in successive rounds to eliminate the state with the fewest first preferences, Nevada's base will be selected for closing.

Those who want to keep the Nevada base open will not support that method. They might suggest use of the so-called "Borda count," which reflects preferences in voting. See ORDESHOOK, *supra*, at 68; PAULOS, *supra*, at 263. For instance, Nevada might suggest that each first-preference vote count for five points, each second-preference vote count for four points, third-preference votes three points, fourth preference two points, and fifth preference one point, and that each state be judged on its total number of points. Under this method, Oregon's Borda count comes out to 191 and is higher than all the others. Oregon's base would be closed.

Oregon's contingent will not support that voting method. They will argue that the best way to determine the outcome should be to pair off the states in head-to-head votes. If one state beats all the other states, that state should be selected. In the parlance of choice theorists, this exercise would produce a "Condorcet winner." A Condorcet winner is the alternative that can beat any other alternative in a head-to-head vote. See HEAP ET AL., *supra* note 142, at 221; ORDESHOOK, *supra*, at 66; PAULOS, *supra*, at 263. Under this method, Pennsylvania's base would be selected for closing. Obviously Pennsylvania will not support that method and will propose an alternative method, and so on.

234. Shepsle, *supra* note 233, at 10.

If there is a monopoly agenda-setter—someone who is uniquely and completely empowered to pick and order elements of an agenda . . . there is always sufficient opportunity for him to manipulate the sequence of votes to produce any final outcome he desires; the preferences of other legislative agents are no constraint.

Id.

235. See Barbara Sinclair, *Agenda Control and Policy Success: Ronald Reagan and the 97th House*, 10 LEGIS. STUD. Q. 291 (1985) (discussing President Reagan's policy methods and subsequent success as the congressional agenda setter in 1980), reprinted in CONGRESS, *supra* note 162, at 637. While scholars have taken great pains to demonstrate the power of the agenda setter with academic rigor, they could have established the truth of the proposition by taking a field trip to Capitol Hill and talking openly with committee chairs there. Representative John Dingell, long-time chair of the House Energy and Commerce Committee, has frankly stated before the Rules Committee: "If you let me write the procedure and I let you write the substance . . . I'll screw you every time." John McLaughlin, *Detroit Powerhouse*, NAT'L REV., Feb. 27, 1987, at 24, 24.

4. The Agenda Setter as Problem Framer

The agenda setter also possesses the power to serve as a second problem framer by manipulating the amendment process to take advantage of substantive preferences of the voting group. Agenda setters employ two common strategies when acting as problem framers: adding amendments to a bill until it collapses under its own weight, or proposing an amendment so unpalatable to the proponents of the legislation that they will vote against the overall measure if the amendment is adopted.²³⁶

The fate of the banking legislation considered by the House Banking Committee in the 100th Congress illustrates the power of the agenda setter as problem framer.²³⁷ The Committee started with a bill that would have removed product line barriers from depository institutions and allowed them to engage in the securities and insurance business.²³⁸ With respect to this controversial legislation, the members of the Banking Committee and Congress at large fell into three groups: proponents of broadened powers (Proponents), opponents of broadened powers (Opponents), and fence-sitters (Fence-Sitters). Being political animals, very few members of these three groups had set their views in stone. They all recognized that some bargaining would take place.

The Proponents, although having no appetite for additional banking regulation, understood that some additional regulatory measures would be the cost of getting the new powers they desired. The Opponents, although unwilling to let banks increase their powers, realized that such an expansion of power was possible. If powers were to be expanded, however, the Opponents wanted sufficient regulatory safeguards and "firewalls" built into the legislation. The Fence-Sitters were in the middle, understood both arguments, and sympathized with the Proponents, but preferred to stick with the existing regulatory scheme unless they could be convinced that the banking industry would not abuse its new powers.

At the outset of the process, therefore, the three groups displayed the following preferences:

Proponents:	(1) Full New Powers	(2) Regulated Powers	(3) No New Powers
Opponents:	(1) No New Powers	(2) Regulated Powers	(3) Full New Powers
Fence-Sitters:	(1) Regulated Powers	(2) No New Powers	(3) Full New Powers

236. OLESZEK, *supra* note 149, at 214.

237. The discussion that follows is based in large part on a hypothetical discussed in HEAP ET AL., *supra* note 142, at 251-52.

238. For a description and discussion of the bills under consideration in 1988, see Shafer, *supra* note 226, at 989-97.

Assuming that the three groups split the voting power in such a way that two factions voting together were needed to carry the vote, the Regulated Powers bill emerged as the natural middle ground.²³⁹ After these initial preferences were made known, therefore, the central issue was no longer whether additional powers should be granted, but rather under what conditions they should be granted.

At this point, the agenda setter took on the role of problem framer. To move the Full Powers bill before the committee closer to the Regulated Powers bill—the middle ground—the agenda setter had to amend the Full Powers bill before the committee. During this amendment/problem-framing phase, the agenda setter could consider amendments to the bill to make it palatable (or unpalatable, depending on the agenda setter's personal bias) to the critical mass of legislators needed to pass it (or kill it).

In 1988, many provisions were added to the Full Powers bill at the insistence of the Fence-Sitters and the Opponents. By the end of the amendment process, the bill called for toughened standards for the Community Reinvestment Act, rules relating to branch closings, a requirement that all banks provide free check-cashing for government checks, a requirement that banks provide "lifeline" banking services, and, of course, Truth in Savings.²⁴⁰ The banking industry did not oppose each and every proposed new burden, because it understood that some new regulation would be the price the industry had to pay for expanded powers.

At some point, however, the additional burdens tacked onto the bill began to outweigh the value of the new powers, especially in light of the fact that competitors in the securities and insurance industries would not be saddled with similar burdens. Once the additional regulations became part of the bill, however, the Proponents were virtually powerless to get them removed, because to do so would have cost them dearly in political capital.²⁴¹ Faced with too high a regulatory price to pay for increased powers, therefore, the Proponents changed their preferences to prefer No New Powers over highly Regulated Powers. As a result, in the end the preferences of the factions lined up as follows:

239. In the terminology of choice theorists, the Regulated Powers option emerged as the Condorcet winner—that is, in head-to-head votes against the other alternatives, it was the winner against the alternatives. FARBER & FRICKEY, *supra* note 150, at 51. Although the choice of Regulated Powers was the first preference of only one group, it emerged as the natural middle ground when all the groups considered the alternatives. HEAP ET AL., *supra* note 142, at 221.

240. Garsson, *supra* note 228, at 22.

241. Jay Rosenstein, *House Approves Bill Governing Ads, Disclosures for Home Equity Loans*, AM. BANKER, June 21, 1988, at 3, 30.

Proponents: (1) Full New Powers (2) No New Powers (3) Regulated Powers
 Opponents: (1) No New Powers (2) Regulated Powers (3) Full New Powers
 Fence-Sitters: (1) Regulated Powers (2) No New Powers (3) Full New Powers

With this rearrangement, the No New Powers bill now became the Condorcet winner—exactly what the Opponents wanted. In effect, the Opponents were able to block the proposal for increased banking powers by creating a poison pill for the banking industry and saying “go ahead and take these new powers—if you dare.” This episode, therefore, illustrates how the agenda setter can manipulate the committee’s actions through a form of problem framing so that the proposal adopted is actually supported by only a minority.²⁴²

5. Systemic Political Realities

In addition to the powers of the problem framer and the agenda setter, built-in systemic political realities shape the outcome of the legislative process, as well. Individual power plays, turf wars, and personal political agendas often decide the fate of legislation. Truth in Savings in the 100th Congress again provides an example.

Under the neo-republican ideal, civic-minded legislators primarily desire to serve the public good without regard to personal power or committee assignments, and all representatives have a meaningful role in the legislative process without regard to seniority, committee assignment, or party affiliation.²⁴³ The observed reality, however, certainly departs from that ideal. Seemingly without regard to the generation of public-spirited debate on the underlying issues, the banking legislation in 1988 instigated a major turf battle between Representative St. Germain’s Banking Committee and Representative Dingell’s Energy and Commerce Committee.²⁴⁴ The Banking Committee steadfastly resisted attempts by the Commerce Committee to participate in review of the legislation, yet Representative Dingell vowed to “protect the jurisdiction of [the Energy and Commerce] [C]ommittee.”²⁴⁵ Because both of these powerful House committees (arguably) had jurisdiction over subject matter in the banking reform bill, political realities resulted in two different versions of the bill. Ne-

242. FARBER & FRICKEY, *supra* note 150, at 39-40; HEAP ET AL., *supra* note 142, at 252; ORDESHOOK, *supra* note 233, at 71-82.

243. Michelman, *supra* note 162, at 27; Sunstein, *supra* note 157, at 1552-53.

244. The House Energy and Commerce Committee, chaired by Representative John Dingell, had jurisdiction over any legislation involving securities laws. Representative Dingell was seen as partial to the securities industry. In 1988, he was widely regarded as a “spoiler” in the banking reform process, with the power to block any proposal he did not like. Robert M. Garsson, *Proxmire Seen Maneuvering for Reform*, AM. BANKER, Sept. 26, 1988, at 2.

245. Robert M. Garsson, *Banking Panel Turns to its Own Turf Battle*, AM. BANKER, Sept. 30, 1988, at 3.

gotiations between the Banking and Commerce Committees reached an impasse in early October 1988. Eventually, the Committees agreed to one version of the bill, but it was late in the process. House Speaker Wright, generally believed to oppose the bill, did not put it on the calendar.²⁴⁶

Meanwhile, a companion bill to the 1988 House version of Truth in Savings, H.R. 176, had already been proposed in the Senate as Title VI of S. 1866, the Proxmire Financial Modernization Act of 1988.²⁴⁷ Senator Proxmire was retiring after the 100th Congress and wanted to leave his mark by securing the passage of this comprehensive bill. Had the Proxmire bill passed, it would have represented the most wide-ranging change in regulation of the banking industry since the Depression.²⁴⁸ But the Proxmire bill did not pass. When it got bogged down in the Senate, Senator Proxmire proposed tying his entire bill to H.R. 176—the House version of Truth in Savings—as an amendment. Because H.R. 176 had already been approved by the House, it would have been appropriately before the Senate. This parliamentary move would have allowed the full Senate to consider the Proxmire Financial Modernization Act and then return it to the House for ratification as an amendment to H.R. 176.²⁴⁹ Due to political maneuvering by other senators, however, Senator Proxmire was unable to use H.R. 176 in his plan.²⁵⁰ Even if Proxmire had been able to get the amended version of H.R. 176 out of the Senate and sent back to the House, House Speaker Wright would in all likelihood not have asked the House Rules Committee to clear the bill for House action.²⁵¹

The legislative history of the bill in the 100th Congress illustrates congressional micropolitics at work. While the neo-republican model would have political representatives deliberating over laws addressing problems for the public interest, in fact, little attention is paid to the problem-solving aspects of legislation. Instead, Representative Dingell's drive to protect the political power that resided in his com-

246. Speaker Wright hailed from Texas, a state with wildcat S&Ls that already operated under very liberal state laws. See STEPHEN PIZZO ET AL., *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS & LOANS* 34-35 (1989) (providing an example of the poor S&L situation in Texas). Texas thrifts had little to gain from the banking reforms proposed in 1988. Speaker Wright was widely regarded as a friend of the thrift industry, see L. WILLIAM SEIDMAN, *FULL FAITH AND CREDIT* 189-90 (1993), and that industry affiliation may have influenced his perspective on banking reform. *Id.*

247. See Shafer, *supra* note 226, at 989 & n.181.

248. See generally *id.* (discussing advantages of Proxmire Financial Modernization Act).

249. For a discussion of these House and Senate machinations, see *Chances of Banking Reform Bill Enactment Said Slim*, 51 Banking Rep. (BNA) No. 13, at 569 (Oct. 3, 1988).

250. *Id.*

251. Garsson, *supra* note 244.

mittee, Senator Proxmire's personal desire to leave his mark on the law, and Speaker Wright's personal allegiances and prejudices together played a major role in the legislative process. The issues that motivated Dingell, Proxmire, and Wright were personal matters that played out as micropolitical battles within Congress.²⁵² The history of Truth in Savings, therefore, illustrates the principle that much of legislative politics is micropolitics.²⁵³

Because the importance of micropolitics in the legislative process is widely accepted, it is not overly cynical to suggest that major policy issues are often decided by micropolitical motives.²⁵⁴ In this view, however, hope for a true problem-solving approach to legislation seems lost.²⁵⁵ The hope appears futile because the legislative process seems driven in large part by micropolitical forces that are relatively impervious to the larger public policy decisions. At the same time, however, the power of micropolitical forces also underscores the need to make sure the original content of the bill has as much integrity as possible, since micropolitical forces might just as easily pass a bill as defeat it.

The significance of political forces in the legislative process may create despair about using legislation to address societal problems or it may present a glimmer of hope that a competent problem framer can help create an effective law. On the side of despair, agenda setters and others wield substantial political power throughout the legislative process, and that power can nullify the efforts of even the most conscientious problem framer. On the hopeful side, however, the political forces in the legislative process seem to affect the *passage* of a bill more than its *content*. The fact remains that a legislative proposal under consideration shapes the debate that follows. It also remains true that the original legislative proposal often passes with relatively few funda-

252. By micropolitical, I am referring to the political analog to microeconomics. In other words, the politics of the legislature as legislature, rather than the politics of the legislature as intermediary for the macropolitical forces of society generally.

253. As Kenneth Shepsle has observed, "As far as I can determine, there is near-universal consensus that much of legislative politics is micropolitics. There are no grand controversies, methodological or substantive, pitting microanalysis against macroanalysis." Shepsle, *supra* note 233, at 12.

254. *Id.* (finding that although determining exactly what the self-interest of legislators is presents a challenge: "[O]ne is not taken to be a cynic for seeing the legislature as an arena in which self-interested behavior is manifested, that is, in which micromotives determine macroperformance").

255. Although the micropolitical outlook may appear bleak, it is not completely devoid of hope. The powerful people who dominate Congress change over time. Of the power brokers involved in 1988—Proxmire, St. Germain, Dingell, and Wright—only Representative Dingell remains in office as of this writing. With different personnel come different micropolitical struggles, but chances are they will not always play out the same way.

mental changes. These facts, therefore, give the legislative drafter great incentive to serve her constituents by crafting her bill in a way that identifies the problem rigorously and proposes an effective solution. These facts should also serve as an incentive to modify the legislative process to make it more of a problem-solving method.

III. PROSPECTS FOR IMPROVING LEGISLATIVE METHODOLOGY

Although Congress currently lacks an effective problem-solving methodology, hope exists for improvement. Any prospects for improvement must, however, come to terms with the need to candidly identify values and facts, make decisions based on a sophisticated model of behavior, address causes rather than symptoms, and adequately deal with the political forces that permeate the process. The previous discussion, however, shows that the political process may not permit the candid separation of facts and values, that the use of models may be misleading if the policy analyst is not expert, and that the careful examination of an issue to determine causes and conditions frequently fails to occur. Even if a problem framer takes all these steps, the existing political process can negate the problem framer's efforts. This part of the Article considers and evaluates several possible avenues for dealing with these factors to improve the problem-solving ability of Congress.

A. *Change the Legislative Process*

An intimate and dynamic connection exists between the legislative process and the content of legislation.²⁵⁶ Intuitively, if one aims to improve the legislative product, it would seem necessary to change the legislative process. An especially important change in light of bills like Truth in Savings would be to separate the language of a particular legislative proposal from the underlying issue the bill is designed to address. As was the case in Truth in Savings, the language of the draft bill may so shape the discussion of the issue as to foreclose the consideration of policy alternatives.

Professor Edward Rubin has suggested changes to the current legislative methodology that would uncouple the text of a statute from the problem identification process.²⁵⁷ Professor Rubin's problem-solving methodology flows from the familiar public policy analysis employed to evaluate policy options.²⁵⁸ While Professor Rubin believes that per-

256. See OLESZEK, *supra* note 149; SMITH, *supra* note 10; TERRY SULLIVAN, *PROCEDURAL STRUCTURE: SUCCESS AND INFLUENCE IN CONGRESS* (1984).

257. Rubin, *supra* note 1, at 283-306.

258. The public policy analysis proceeds stepwise in the following manner: (1) identify the problem; (2) define and rank goals for solving the problem; (3) specify all relevant

forming a complete methodical policy analysis in the course of the legislative process is likely impossible, he nevertheless believes that public policy analysis can form the foundation of a more effective legislative methodology.²⁵⁹

Professor Rubin's methodology for the design of regulatory statutes avoids the problem of the bill's language setting the stage for the rest of the deliberation by starting the legislative process with an *issue*, rather than a fully drafted bill. After an issue has been identified, a hearing would be called, the purpose of which would not be to write statutory language, but rather to determine goals that generate criteria for measuring the statute's ultimate success.²⁶⁰ After establishing the goals of the legislation, the next step would determine the relationship between those goals.²⁶¹ The process would then focus on identifying the implementing mechanism to carry out the function of identifying the options available for achieving the goals identified.²⁶² The selection of the implementing mechanism would be made after due consideration of political factors, the expertise of the possible implementing agencies, and the salience of the new assignment to a given agency's general mission.²⁶³

Professor Rubin's approach reflects a general bias toward letting the implementing agency, rather than Congress, hammer out the details of regulatory policies.²⁶⁴ He offers little formal methodology with regard to substantive provisions of the statute, since he observes that legislators tend to focus on a bill's substance to the exclusion of all

options for meeting the goals; (4) collect data relevant to each option; (5) predict consequences on the basis of the data collected; and (6) select the option that best achieves the goals. *Id.* at 282; *see also* CARL V. PATTON & DAVID S. SAWICKI, BASIC METHODS OF POLICY ANALYSIS AND PLANNING 26-38 (1986).

259. Rubin, *supra* note 1, at 282-83.

260. *Id.* at 286. Professor Rubin would focus on goals rather than on rigorous problem definition because, in his view, the way Congress works tends to conflate these two functions as a practical matter. *Id.* at 283.

261. *Id.* at 286.

262. *Id.* at 289. Professor Rubin identifies three general approaches to the implementation of a statute. First, the legislature can create a new judicial or administrative implementing mechanism. Second, it can restructure an existing judicial or administrative implementing mechanism. Third, it can create a new set of substantive provisions for an existing implementation mechanism. *Id.* at 291.

263. *Id.* at 292-93.

264. This position is not without its critics, who suggest that Congress has gone too far in delegating to administrative agencies. *See, e.g.,* Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989). On the other hand, it has been argued that the goal of deliberative decisionmaking that serves as a central aspiration of the civic republican model may only be achieved through the operation of administrative agencies. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541 (1992); *see infra* notes 287-93 and accompanying text.

else.²⁶⁵ Similarly, he would not suggest the development of an array of policy options during the legislative process because he believes that once the goal is chosen, the possibilities for its attainment will probably be apparent to the legislators.²⁶⁶ His approach represents a coherent and justifiable approach for improving legislative methodology. It would avoid the problem of the proposed text of a bill shaping the policy options by separating the problem-identification process from the text drafting process. That change alone would result in the legislature's considering more options in response to problems.

His methodology, however, also has shortcomings. First, the proposed methodology does not call for a rigorous identification of the problem that the legislation is supposed to address. Professor Rubin appears too willing to give up on the possibility that the legislative process could ever perform a rigorous public policy analysis of proposed legislation.²⁶⁷ Instead, he willingly forgoes a rigorous problem-identification process and settles for a hearing to establish the goals of the legislation. The mere identification of goals, however, does not form a good basis for policy development. As Professor Rubin's own observations show, goals can be quite malleable and may be more a justification for a law rather than a reason for the law's existence.²⁶⁸

Second, Professor Rubin does not suggest a methodology for linking the proposed legislative response to the problem being addressed. He does not offer any methodology for guiding the creation of legislation other than articulating goals and carefully considering the method of implementation. This lack of explicit methodology may result from his view of the legislative function primarily as the method by which to create authority for agencies to act.²⁶⁹ In practice, however, Congress does not act solely by issuing directions to agencies. Often, Congress gets involved in the details of particular businesses,

265. Rubin, *supra* note 1, at 295.

266. *Id.* The final step in his methodology would call for either Congress or the implementing agency to gather data to evaluate the efficacy of the substantive provisions in light of the goals that had been identified. *Id.* at 299-300. This evaluative step might be achieved through "experimental" legislation—that is, legislation with limited geographic and/or temporal applicability—or other means. *Id.* at 302-06.

267. In one sentence, Professor Rubin dismisses the possibility of a legislative drafter engaging in formal policy analysis, saying that "[e]ven the most politically-insulated, highly-trained, individual decisionmaker cannot follow this approach [formal public policy analysis] for even the most technical decisions." *Id.* at 282.

268. In connection with the Truth in Lending Act, Professor Rubin noted that the bill's sponsors were quite willing to change the stated goals of their bill to suit evidence presented to the subcommittee. *Id.* at 281. In Professor Rubin's words, "Although the Subcommittee failed to consider alternative methods for reaching its goals, it was willing to consider alternative goals by which its chosen methods could be justified." *Id.* at 280-81.

269. *Id.* at 283; Rubin, *supra* note 5, at 372-85.

especially banking—Truth in Savings being one example. Professor Rubin's approach would offer no guidance in these situations.

Third, Professor Rubin's process trusts the congressional committee structure to carry out the process of issue identification and goal prioritization. If the goal of the legislative process is to find substantively correct solutions to social problems, however, relying on the existing committee structure to carry out those tasks will doom the project to failure. Congressional committees are political hotbeds.²⁷⁰ Any issue that comes out of a committee will be shot through with political considerations.²⁷¹ In addition, committee members have too many demands on their time to attend or participate whole-heartedly in committee hearings.²⁷² Finally, committees are an improbable place for careful examination of the causes and conditions of an issue because most committee members already have their minds made up about the topic before any witnesses ever appear and do not care to obtain any additional information.²⁷³

Overall, as a method for improving the problem-solving methodology of Congress, Professor Rubin's approach would tend to achieve the important goal of separating the proposed language of the bill from the identification of issues and goals. It would, however, allow the political process to throw obstacles in the path of problem framers trying to analyze problems rigorously.

B. Require Written Justification of Legislative Enactments

Professor Robert Seidman has proposed a second approach to improving legislative methodology. He would impose a requirement that Congress accompany legislative enactments with memoranda of law justifying the action, in much the same way that judges are required to write opinions.²⁷⁴ Professor Seidman focuses on the work of the legislative drafter and the need to justify the legislation in terms of the neo-republican ideal.²⁷⁵

270. OLESZEK, *supra* note 149, at 93-97.

271. As we have seen, political forces may prevent a problem framer from being able to separate values from facts in the problem-identification process. See *supra* notes 181-82 and accompanying text.

272. HOW CONGRESS WORKS, *supra* note 149, at 45; OLESZEK, *supra* note 149, at 98.

273. OLESZEK, *supra* note 149, at 98.

274. Seidman, *supra* note 5, at 7-8. Although legislative enactments are already frequently accompanied by some information from the legislative drafter, those materials are often incomplete and of poor quality. *Id.* at 3-4.

275. *Id.*

The first part of the memorandum would identify the problem addressed by the legislation.²⁷⁶ Professor Seidman insists that the drafter be candid about her underlying view of the world so that other players in the process might understand why she views the behavior as a problem. The drafter would be required to develop causal explanations for the difficulty based on a sophisticated model. To perform this task, the drafter would have to distinguish between causes and conditions²⁷⁷ and provide adequate explanations.²⁷⁸ To ensure the rigor of this step, the explanations must be provable and not based on mere assertions of subjective values or attitudes.²⁷⁹

The memorandum would also require the drafter to propose a solution to the problem identified. It would have to demonstrate how the proposed legislation would provide the most efficient solution by describing alternative possible solutions (from history, comparative law, scholarly writing, interested parties, or theory), describing the proposed solution and showing how it addresses the causes earlier explicated, demonstrating how the legislation will induce the behavior it prescribes, and preparing a cost-benefit analysis.²⁸⁰

Professor Seidman's approach would go a long way toward ensuring that a rigorous problem-solving methodology guided the legislative drafting process. Following his system, a legislative drafter would put the world on notice as to what values she sees the world through. It would also require the drafter to defend rigorously her policy choices with the use of empirical evidence, and it would ensure analysis of the causes and conditions of the problem by making that analysis compulsory.

Despite its many good points, Professor Seidman's approach suffers from several weaknesses. The foremost deficiency of the approach is that it fails to deal adequately with political influences.²⁸¹ Professor Seidman concedes that for his method to work, the drafter cannot be just an advocate of the bill, but instead must be an advocate of the

276. Professor Seidman sees all appropriate legislative problems as patterns of undesirable social behavior and all appropriate legislative responses as attempts to change that undesirable behavior. *Id.* at 60.

277. *Id.* at 62.

278. To merely state the absence of a proposed solution as a cause of the problem would not be a sufficiently adequate explanation. *Id.* at 63.

279. *Id.*

280. *Id.* at 65. Finally, Professor Seidman's approach, like Professor Rubin's, would require some mechanism to monitor and evaluate the efficacy of the solution in terms of the problem identified. This requirement might be met through any of several devices, such as a "sunset clauses" or a requirement of periodic reports to Congress. *Id.* at 74-76.

281. Professor Seidman recognizes three separate aspects of the legislative project: power, substance, and form. *Id.* at 12. His approach deals with the substantive element, to the exclusion of the others. *Id.* at 15.

legislative process.²⁸² As an ideal, this approach carries much weight, but in the political world of Congress, a proposal for improved legislative methodology must take political reality into account.

A second shortcoming relates to the first: the approach requires candor on the part of the drafter. Drafters would have to be forthright about the "grand theory" employed to rationalize the proposal. Despite the benefits that may flow from candor in the legislative process, however, it may be politically impossible as a practical matter.²⁸³ In addition to the many political obstacles that make candor difficult, on a more subtle level the drafter likely has only a dim idea of what her true domain assumptions are or what "grand theory" she employs when looking at the world.²⁸⁴

Third, the Seidman methodology places a great many demands on the drafter's time, resources, and expertise to prepare a comprehensive memorandum justifying the legislation. Many drafters, especially those in congressional representatives' offices, will not have the time, resources, or expertise to carry out the task. Asking those staffers to employ sophisticated models to justify their proposals may result in a poor work product.

Although Professor Seidman's approach possesses the beneficial aspects of a methodical system for defining problems and analyzing the policy choices in terms of the identified problems, as a practical and political matter, it may not be a workable alternative.

C. *Delegate to Non-Congressional Bodies*

Some of the problems with the current legislative methodology may be overcome by involving non-congressional groups such as regulatory agencies, ad hoc committees, or standing "editorial boards" in the legislative process. These groups would tend to de-politicize the process somewhat and also bring a degree of expertise to the substance of the legislation that congressional representatives may lack.

282. *Id.* at 17 (citing Purdy, *supra* note 19, at 77-78).

283. See *supra* notes 183-91 and accompanying text.

284. In remarking about candor in the judicial context, Professor Zeppos noted:

It is also possible that judges reach a result consistent with their personal preferences but convince themselves that they have done no more than read the originalist evidence. Thus, if we asked these judges to be candid and to tell us their 'real' reasons, they would look genuinely puzzled and point to their written opinions.

Zeppos, *supra* note 183, at 409. A similar self-deception or lack of self-knowledge may affect legislative drafters as well.

1. Delegate to Ad Hoc Committees

An alternative to the usual method of producing legislation would be to have Congress act only as a problem identifier and to delegate the study of those problems to ad hoc committees. Congress has successfully employed this method in the past in areas of substantive or political complexity.²⁸⁵ This method possesses several strengths. First, by impaneling an ad hoc group of experts, problems could be identified on more neutral ideological grounds than in the political arena. Second, the panel might be capable of highly sophisticated analysis and could examine matters closely to determine causes and conditions. Third, the panels, being unelected and serving in an ad hoc capacity, might be less subject to political influences than elected representatives.

On the other hand, the outside committee process would present extreme logistical problems for Congress. It makes sense in many situations where Congress lacks the political will to act or lacks the expertise necessary to address the issue. Because of the time involved, however, it would not prove an effective method of carrying out the routine business of Congress. Also, appointing special commissions as a routine event might raise concerns about the legitimacy of the political process. For example, the Defense Base Closure and Realignment Commission may have successfully closed unneeded military bases precisely because it was an anti-democratic body and its proceedings were not entirely open to the public.²⁸⁶

In addition, the *process* employed in the special committee may fail to meet the basic requirements of democratic norms and the *composition* of the special committees might run afoul of democratic values. While commissions might be structured in such a way that all affected constituencies are represented, some parties with legitimate concerns may be left out or, worse yet, the commission may be stacked to give one viewpoint more weight. The special commission structure, therefore, may help achieve the goals of providing expert analysis of the problem with some insulation from politics, but it may not be politically acceptable.

285. The examples of copyright law, bankruptcy law, military base closings, social security reform, and health care are discussed *supra* notes 20-24 and accompanying text.

286. See Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 952-53 (1990) (suggesting the success of the Defense Base Closure and Realignment Commission and other ad hoc national commissions has been due, at least in part, to the fact that the commission structure allows the creation of an informal bargaining mechanism outside of the public eye).

2. Delegate to Agencies

Some commentators suggest that any hopes for rational policy decisionmaking rest with the administrative agencies and not with Congress.²⁸⁷ They favor a system where Congress identifies big issues and delegates to agencies the authority to carry out the policy articulated by Congress. This approach is consistent with the goal of insuring a coherent regulatory strategy by allowing the agencies to take broad congressional directives and translate them into specific policies.²⁸⁸ Such an approach would also achieve the requirement that policymakers look at the world with the aid of a sophisticated model, as the agency experts likely will be sophisticated in the issues presented. Finally, the opportunity afforded to interested parties to participate in the administrative process and the relative insulation of the regulators from the political forces that buffet Congress²⁸⁹ make the administrative agencies the most likely place where true deliberation will take place and where good policy decisions will be made.²⁹⁰

Other commentators, however, have questioned the view that administrative agencies possess the expertise and political insulation often claimed.²⁹¹ One of the most difficult matters to deal with in the context of independent agencies is the tendency of those bodies to come under the strong influence of the very industries they are sup-

287. Professor Rubin has been an advocate of allowing administrative agencies to play a more active role in policy development. In his legislative methodology discussed above, the purpose of the legislative effort would primarily be to direct an administrative agency to take action in a particular area. Rubin, *supra* note 1, at 283.

288. GARTEN, *supra* note 132, at 147-50. This process has been employed in many areas of substantive federal law. Most of antitrust law, for instance, flows from the very broad provisions of the Sherman Act, 15 U.S.C. § 1 (1988 & Supp. IV 1992), which basically allows the Justice Department to develop substantive antitrust laws through litigation and agency guidelines. Similarly, the Federal Trade Commission was created with the relatively broad mission of preventing the use of "unfair methods of competition." 15 U.S.C. § 45(a)(2) (1988). Along the same lines, the Federal Communications Commission was charged with regulating broadcasting "as public convenience, interest, or necessity requires." 47 U.S.C. § 303 (1988).

289. Although one might argue that the administrative agencies are subject to political forces as well, the forces seem to be somewhat attenuated because the executive branch must have its nominees approved by the Senate and because the politically appointed agency head must deal with an apolitical staff of civil servants who may undercut the particular political ideology of the agency chief. See generally Strauss, *supra* note 122.

290. See Seidenfeld, *supra* note 264, at 1541-50.

291. See Cutler & Johnson, *supra* note 122, at 1402-09 ("Some critics tell us that independent agencies have been captured by the industries they regulate. Instead of praise for useful continuity, we hear complaints about excessive bureaucratic rigidity."). The authors go on to note that increasingly the agencies are being asked to decide political questions, rather than questions requiring the action of disinterested "experts." *Id.* at 1405.

posed to regulate.²⁹² If the agencies charged with developing policy are predisposed to one group, the problem-identification process will be skewed and the entire regulatory effort will go awry.²⁹³

3. Adopt The Uniform Law/Permanent Editorial Board Model

Another alternative regime for improving federal statutes is to take a page from the National Conference of Commissioners on Uniform State Laws (NCCUSL) and establish expert panels to oversee and revise existing regulatory structures and suggest changes for their improvement.²⁹⁴ Congress has experimented on occasion with the use of expert or "blue ribbon" panels to help formulate national policy on an ad hoc basis.²⁹⁵ On a more permanent basis, however, it could establish "permanent editorial boards" (for lack of a better term) based on the model used for the development of uniform and model state laws.²⁹⁶ The uniform laws model would permit experts from industry, academia, and the legal profession to draft legislation. Such a panel would certainly operate with a sophisticated model of how the real world works and would have experience with the problems the statutes should address. A standing editorial board could monitor the statute to make sure it is carrying out its intended purpose and addressing all the issues it was supposed to address without inadvertently raising new ones.

292. When an interest group "captures" an agency, the agency begins to act as an advocate for a parochial interest rather than disinterested, independent experts. See Sunstein, *supra* note 69, at 426-28.

293. Taking the situation with Truth in Savings as an example, an agency considering the issues presented by Truth in Savings could frame the issues in very different ways. With respect to the relationship between the bank and its customer, for instance, a regulator with a pro-consumer bias might identify the problem as unfair bargaining power between banks and their customers such that banks can dictate the terms of deposit accounts and customers must live with those terms. On the other hand, a regulator with a pro-banking bias might look at the bank-customer relationship and see a problem where banks were being subjected to potentially ruinous litigation arising from *Perdue*-type claims. See *supra* notes 90-93 and accompanying text.

294. Professors Neil Cohen and Barry Zaretsky have suggested such an arrangement for the unification of commercial law. Neil B. Cohen & Barry L. Zaretsky, *Drafting Commercial Law for the New Millenium: Will the Current Process Suffice?*, 26 LOY. L.A. L. REV. 551, 557-61 (1993).

295. See *supra* notes 20-24 and accompanying text.

296. For an overview of the structure and history of the National Conference of Commissioners on Uniform State Laws, see Frederick H. Miller et al., *Introduction to Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449, 1449-51 (1991); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2097-103 (1991). For an overview of the process by which the Model Business Corporation Act (overseen by the American Bar Association, rather than the NCCUSL) is revised, see Robert W. Hamilton, *Reflections of a Reporter*, 63 TEX. L. REV. 1455, 1458-63 (1985).

Although in theory a politically insulated, independent panel of experts proposing a new law might be expected to produce a high quality proposal for legislation, the evidence from the uniform-laws process does not necessarily bear out that assumption.²⁹⁷ In the 101 years of its existence, the NCCUSL has proposed between 200²⁹⁸ and 360²⁹⁹ acts, depending on how one defines an "act." The quality of the uniform law proposals has varied considerably. Using the number of states that have adopted a proposed uniform law as a proxy for quality, the NCCUSL's success rate has been quite modest. Only twenty-two acts have been adopted by more than forty states,³⁰⁰ while 107 acts have been enacted in fewer than ten states.³⁰¹

Evidence of the uneven quality of the uniform acts need not rest solely on the record of adoptions. Common experiences establish that the uniform law process sometimes produces a poor product. While the Uniform Commercial Code (UCC) has been hailed as "the most spectacular success story in the history of American law,"³⁰² many professors and lawyers can relate horror stories of particular provisions (or entire articles) that do not work very well, despite the prolonged efforts of many dedicated and talented persons at the NCCUSL.³⁰³ Although specific flawed provisions in a statute as complex

297. The NCCUSL is an elite group, typically composed of prominent lawyers selected by the governor of their home state. White, *supra* note 296, at 2096. In Professor White's words, the NCCUSL is a group "much more sophisticated in the law and more interested in long-range questions than they would be if they [were elected legislators who] had to stand for reelection every two or four years." *Id.*

298. *Id.* at 2103.

299. Richard E. Coulson, *The National Conference of Commissioners on Uniform State Laws and the Control of Law-Making — A Historical Essay*, 16 OKLA. CITY U. L. REV. 295 (1991).

300. White, *supra* note 296, at 2103. Actually, this number somewhat overstates the success rate because the Uniform Commercial Code—by far the NCCUSL's most successful project—replaced several different earlier successful uniform acts and itself is counted as at least three acts (original 1962 version and subsequent revisions). *Id.* at 2103-04.

301. *Id.* at 2103. Of that 107, 77 have not been adopted by even five states, and beyond that a number of proposed acts were never adopted by any jurisdiction. *Id.*

302. JAMES WHITE & ROBERT SUMMERS, *UNIFORM COMMERCIAL CODE* 5 (3d ed. 1988).

303. Probably the most notorious example of a botched provision of a uniform law is § 2-207 of the Uniform Commercial Code. In the words of Grant Gilmore, § 2-207 is "arguably the greatest statutory mess of all time" and "was a miserable, bungled, patched-up job—both text and Comment—to which various hands . . . contributed at various points, each acting independently of the others (like the blind men and the elephant)." Letter from Grant Gilmore, Professor of Law, Vermont School of Law, to Robert S. Summers, Professor of Law, Cornell University Law School (Sept. 10, 1980), *reproduced in* RICHARD E. SPEIDEL ET AL., *SALES AND SECURED TRANSACTIONS* 514 (5th ed. 1993). Section 2-207's poor performance may be a function of the strained process it underwent on the way to becoming part of the UCC and the subsequent changes made to the provision after its original formulation. For a discussion of the background of § 2-207, see WHITE & SUMMERS, *supra* note 302, § 1-3.

as the UCC should not serve as an indictment of the entire uniform law movement, they may belie the idea that careful deliberation by a panel of experts will produce a flawless product.³⁰⁴ In fact, no shortage of criticism exists concerning the efforts of the NCCUSL's recent drafting efforts.³⁰⁵

A more serious problem with the uniform-laws process is that the elite experts involved in the drafting process may leave a distinctive stamp on the content of the proposed laws that end up treating one class of persons more favorably than others.³⁰⁶ The anti-democratic aspect of the expert panel settling all the details of the legislation deflects much of the legitimate input from elected representatives and may silence the political voices of some segments of society who should have a say in the process.³⁰⁷

304. The process of drafting uniform law provisions is nothing if not deliberate. For a discussion of the torturous process involved in the development of the revised Articles 3 and 4 and new Article 4A, see William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993).

305. A symposium issue of the *Alabama Law Review* on Article 2A contained pieces critical of both the drafters' underlying policy choices and the language used in the Article to put those policies into effect. See Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988). A similar symposium issue on the revisions to Articles 3 and 4 produced similar criticisms. See Symposium, *Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 373 (1991). The fact that so few "uniform" acts are in fact uniform provides some evidence of dissatisfaction at the state legislature level with the product produced by the NCCUSL. Cf. F. Stephen Knippenberg & William J. Woodward, Jr., *Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda*, 45 BUS. LAW. 2519 (1990) (discussing the UCC's strengths and weaknesses despite its actual uniformity among the several states).

306. For instance, Articles 3 and 4 of the UCC have been criticized as pro-bank and anti-consumer, a result achieved primarily because of the composition of the drafting committee. See generally Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679 (1991) (noting the negative effects on consumers, specifically in the regulation of checking accounts); Edward L. Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991) (noting the failure of implementing economic efficiency or social equity for the consumer); Julianna J. Zekan, *Comparative Negligence Under the Code: Protecting Negligent Banks Against Negligent Customers*, 26 U. MICH. J.L. REFORM 125 (1993) (noting the increase in consumer responsibilities and in potential consumer liability).

307. Professor Edward Rubin has related his experiences as chair of the ABA committee that had input into the revisions of Articles 3 and 4 in a surprisingly frank article that severely criticizes the drafting process. Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993). In the article, he states that the revisions of Articles 3 and 4 do the bidding of the banking industry with little regard to the interests of other groups affected by the payments process, especially consumers. See *id.* He notes:

In the process of drafting and enacting the revisions of Articles 3 and 4, however, one of the major forces was not present. Banks were well represented; corporate users were represented intermittently; but consumers were virtually unrepresented. The result was that the banking industry and its attorneys dominated the entire process, save for a few brief interludes. . . . The banking industry is entitled to be represented, of

Another possible drawback to this method is that it may tend only to codify existing practice³⁰⁸ and ignore new ideas or innovative approaches to the problem.³⁰⁹ The result of this tendency may produce a law that will require frequent revisions and amendment, especially if it has many technical provisions.³¹⁰ This result defeats the goal of employing experts in order to achieve a sophisticated view of the problems addressed in hopes of implementing innovative and effective policies. In light of these several criticisms, therefore, creating "permanent editorial boards" may not result in more effective legislation.

D. Post-Enactment Review

An alternative to changing the legislative process to get the legislation right in the first place is to create post-enactment review mechanisms whereby the legislation would be required to justify itself based on the problem it was supposed to solve. Reviewing the legislation after enactment would affect the legislative process because sponsors of legislation who want their statutes to remain in effect will be more explicit about what goals the law seeks to achieve and how those goals

course, and it can be expected to lobby assiduously for its positions. But the American Law Institute and the National Conference of Commissioners on Uniform State Laws should not lend their names to the bankers' enterprise. When then do, as occurred with the Article 3 and 4 revisions, they give the banking industry the ability to clothe itself with public policy, and to overwhelm most state legislatures with a false aura of public-oriented impartiality. This was a disgrace. If the ALI and NCCUSL cannot do better under their present structure, both organizations should be extensively reformed or entirely abolished.

Id. at 787-88; see also Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993) (analyzing the current structure of the uniform laws drafting process and concluding that it "is almost custom-made for the drafting and enactment of pro-business legislation").

308. See Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 626-27 (1981) (voicing concern that the codification process tends to enshrine the practices of the past).

The basic flaw in our analysis was our failure to perceive that the twentieth century financing assignee was not in the least like the stranger who, one hundred and fifty years earlier, had bought goods, commercial paper, and other property in an open market without being able to find out about the prior history of whatever he bought.

Id.; see also Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

309. Commenting on the Revised Model Business Corporation Act, Professor Hamilton stated: "A major consequence of the Committee's large plurality of practicing attorneys was a substantial conservatism. By and large, this group was reluctant to consider innovative proposals unless the need for them had been demonstrated by actual practice or experience." Hamilton, *supra* note 296, at 1466.

310. Julian B. McDonnell, *The Code Project Confronts Fundamental Dilemmas*, 26 LOY. L.A. L. REV. 683, 686-88 (1993).

will be achieved. Post-enactment review would also provide legislators with valuable feedback about which approaches work and which do not.³¹¹ In general, four approaches have evolved to carry out post-enactment review: enhanced judicial review, sunset clauses, oversight committees, and law revision or audit commissions.

1. Enhanced Judicial Review

There seems to be a dynamic link between the judiciary and the legislature where the actions of one may result in actions by the other.³¹² Professor Cass Sunstein has argued for heightened judicial review of congressional enactments to reinforce the ideals of the neo-republican model and, by implication, to improve the content of legislation.³¹³ Professor Sunstein would seek to heighten the rationality requirement of the equal protection, due process, contract, and eminent domain provisions of the Constitution.³¹⁴ Under such an approach, the courts would not defer as a matter of course to legislative actions, but rather would have to find that the legislature in fact acted to attain a legitimate purpose and not just in response to interest group pressures.³¹⁵ In addition, courts would insist on a tighter fit between the statutory means and the articulated policy ends.³¹⁶ By providing a "negative feedback loop" to legislators, judicial review would create incentives to make the problem-solving process more rigorous and deliberate.

Professor Sunstein's approach might make legislatures more deliberative, but it might as easily make them more devious. Given the complexity of the legislative process and Congress' sheer size, judicial review of the deliberative nature of the legislative process may be a weak method of improving the legislative product.³¹⁷ Even if the judiciary were to take a more active role in the critique of the legislative process by articulating a set of values that support our legal system and

311. Designers of legislation need information about the failure of statutes in order to improve statutory design. See *supra* note 13.

312. See, e.g., John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) (discussing how judicial review affects the deliberative processes in the other branches of a democratic government); Mark C. Miller, *Congress and The Constitution: A Tale of Two Committees*, 3 CONST. L.J. 317 (1993) (examining how different congressional committees handle constitutional matters).

313. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 164 (1990); Sunstein, *supra* note 160, at 69-72.

314. Sunstein, *supra* note 160, at 69.

315. *Id.*

316. *Id.*

317. Seidenfeld, *supra* note 264, at 1541.

form the basis for governmental policy,³¹⁸ the use of judicial review would likely fall short of improving the problem-solving process by enhancing the neo-republican ideal.³¹⁹ The effect of judicial review is too far removed from the policy-development process to make an impact.

2. Sunset Provisions

Commentators have remarked on the modern explosion in statutory law³²⁰ and the need to eliminate unnecessary or obsolete statutes.³²¹ One approach to weeding out laws is to make legislative enactments terminate after some set period of time, subject to explicit review and reauthorization.³²² During the 1970s, a number of states adopted sunset laws designed to force the review of government programs after a certain time period.³²³ Under these statutes, the review of government programs often is delegated to an independent audit agency with the power to make recommendations to the legislature.³²⁴ At the national level, a sunset law was introduced in Congress but was never passed.³²⁵

318. This approach has been suggested by Professor Frank Michelman. Michelman, *Foreward*, *supra* note 160, at 66-73.

319. Seidenfeld, *supra* note 264, at 1542. Professor Sunstein concedes that the judicial branch acting on its own will not be able to accomplish a great deal in bringing politics closer to the republican ideal, but nevertheless maintains that if courts adopted a more explicit republican outlook on the political process they could exert some influence on the political process. Sunstein, *supra* note 160, at 68.

320. See Hutchinson & Morgan, *supra* note 6, at 1753 (providing statistics on explosion of legislative activity at state legislature level and number of cases before Supreme Court involving application of a statute).

321. See, e.g., Garwood et al., *supra* note 67, at 793.

322. An early proponent of this idea was Professor Theodore Lowi. Professor Lowi found inspiration in the writings of Thomas Jefferson to propose a "Tenure of Statutes Act," which would place a limit of five to ten years on every organic act of Congress. THEODORE J. LOWI, *THE END OF LIBERALISM* 309-10 (1969). In Professor Lowi's view, the required termination of the program would require serious thought on the part of Congress as to whether to keep the program alive and would supplant the largely superficial (in his view) review of programs that occurs each year during the appropriations process. *Id.*

323. More than 75% of the states have some form of sunset legislation on the books. KEEFE & OGUL, *supra* note 10, at 350; see, e.g., COLO. REV. STAT. ANN. § 24-34-104 (West 1990 & Supp. 1993).

324. *THE EFFECTIVENESS OF LEGISLATIVE PROGRAM REVIEW* 17, 21 (Richard E. Brown ed., 1979). The Connecticut sunset law is an example of this arrangement. CONN. GEN. STAT. ANN. § 2c-3 (West 1988).

325. For a discussion of the fate of the proposed federal sunset legislation, see ESKRIDGE & FRICKEY, *supra* note 163, at 860-61. It may be that because of the interaction between the judiciary and the legislature, formal statutory sunset provisions are not necessary because judges already employ their own "sunset" powers when interpreting statutes. Dean Calabresi has suggested a twist on the statutory sunset scheme. He argues that judges should be entitled to interpret legislative enactments in a manner relevant to modern

Despite their early momentum, sunset laws have not lived up to their advance billing.³²⁶ It is not clear whether the use of sunset laws would provide meaningful feedback to legislators necessary to improve the problem-solving methodology of Congress. Many sunset laws deal only with statutes creating government agencies. By focusing on that particular implementation mechanism, the laws would be underinclusive in their attempt to eliminate ineffective statutes.³²⁷ On the other hand, if sunset laws were extended to statutes that did not create agencies, the risk of political forces terminating necessary or useful statutes looms large,³²⁸ as does the risk that statutes would be evaluated on inappropriate grounds.³²⁹ In addition, overinclusive sunset provisions may undermine government morale and effectiveness as the various agencies approach their "drop dead" dates. Such an effect could adversely affect the regulatory scheme.³³⁰ While sunset laws could prove quite disruptive, the feedback they would provide legislative drafters appears quite attenuated.

3. Oversight Committees

Congressional oversight committees could monitor the effectiveness of statutes. Congress engages in oversight activities on an ongoing basis.³³¹ Typically, congressional oversight activities are thought

conditions, or even to eradicate obsolete or anachronistic laws. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 34 (1982). He goes further to state that judges already do so without explicit recognition of what they are doing. *Id.* at 190 n.31.

326. KEEFE & OGUL, *supra* note 10, at 350.

327. ESKRIDGE & FRICKEY, *supra* note 163, at 861.

328. See CALABRESI, *supra* note 325, at 61.

329. The methods of evaluation would have to be subject to close analysis. The match between the problem addressed by the statute and the method of evaluation should be demonstrated as rigorously as possible in order to avoid improper evaluations. A brief illustration demonstrates the practical importance of the relationship between the problem and the standard for determining the effectiveness of a policy. In the 1970s, the federal government implemented a wide-ranging program designed to reduce drunk driving called the Alcohol Safety Action Project (ASAP). Part of the program called for identifying recidivists and channelling them out of the criminal justice system and into alcohol-abuse treatment programs. The purpose for this effort was to help alcohol abusers come to grips with their drinking and thereby reduce the incidence of repeat offenders. The ASAP pilot program's effectiveness was measured, however, in terms of whether it produced a decrease in alcohol-related fatalities in the cities where it had been implemented. No statistically significant reduction was noted, so treatment programs were labelled as ineffective in the fight against drunk driving. The obvious mismatch between the treatment program's goals and the method used to evaluate it highlight the need to be clear about the link between a law's purpose and the way in which attainment of that purpose will be judged. See Eric J. Gouvin, Note, *Drunk Driving and the Alcoholic Offender: A New Approach to an Old Problem*, 12 AM. J.L. & MED. 99, 123-24 (1987).

330. ESKRIDGE & FRICKEY, *supra* note 163, at 863.

331. In general, the oversight activities of Congress can be broken down into four substantive areas: review of policy implementation; review of the administrative structure;

of in connection with authorizations,³³² appropriations,³³³ and explicit oversight-investigatory actions,³³⁴ although the informal (and cumulative) aspects of congressional monitoring should not be underestimated.³³⁵ The General Accounting Office provides additional oversight of programs, and its activities often form the basis for formal congressional hearings.³³⁶ When congressional oversight works well, it can ferret out waste and mismanagement,³³⁷ allow politically elected representatives to exercise some control over the unelected administrative bureaucracy,³³⁸ and provide useful information back to the legislature.³³⁹ Conceivably, the oversight function might inform the legislature about the effectiveness of particular programs, the accuracy of particular problem descriptions, and other matters relating to the problem-solving capacity of Congress.

Placing such a burden on existing oversight mechanisms, however, may be overwhelming. The existing system of congressional oversight is far from perfect.³⁴⁰ One obvious shortcoming is that it is not systematic, but rather is somewhat rare (in its formal mode) and fairly particularistic in its inquiry.³⁴¹ Even with congressional agencies charged with oversight of particular programs, the level of inquiry can vary considerably based on the personalities of the parties involved or

review of the individuals charged with implementing policies; and review of the expenditure of public funds. For a general discussion, see KEEFE & OGUL, *supra* note 10, at 342-66.

332. OLESZEK, *supra* note 149, at 268.

333. *Id.*

334. The explicit oversight-investigatory activities of Congress are carried out most visibly by two standing committees, the House Committee on Government Operations and the Senate Committee on Governmental Affairs, which have more or less free reign to look into the operation of government programs. See CHRISTOPHER H. FOREMAN, *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* 12 (1988).

335. *Id.*

336. *Id.* at 16.

337. See KEEFE & OGUL, *supra* note 10, at 357-62.

338. The oversight process performs this function by (1) providing an avenue to allow Congress to add flesh to administrative directives that were necessarily broad or vague when passed; (2) keeping a check on bureaucrats' policy choices; and (3) challenging the executive branch over policy implementation. See FOREMAN, *supra* note 334, at 171.

339. *Id.* at 13.

340. For an overview of the many shortcomings of political oversight, see Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN L. REV. 1 (1994).

341. ESKRIDGE & FRICKEY, *supra* note 163, at 486; Keefe & Ogul, *supra* note 10, at 360; FOREMAN, *supra* note 334, at 84. It appears that no one really knows how much oversight Congress engages in, as the definition of "oversight" is far from precise and could include a wide range of informal activities, such as the review of required agency reports, informal communication with regulators, and ad hoc groups within the Congress. OLESZEK, *supra* note 149, at 277.

ideological matters.³⁴² Because congressional oversight will necessarily be a political process, impartial evaluation of programs may be beyond its reach.³⁴³ Because of the overwhelmingly political character of the existing oversight process, therefore, it may not serve as the best way to improve the underlying legislative methodology. The political realities that bedevil the problem-framing process will resurface in the context of political oversight of those statutes.

4. Law Revision/Audit Commissions

Another way to provide feedback to legislators about the effectiveness of their statutes is to revise the laws systematically. Although Congress has from time to time revised the federal laws, the process does not proceed with the regularity that it does in other countries.³⁴⁴ One method for effecting such a systematic revision process is to create a law revision commission. This idea is not a new one.³⁴⁵ Justice Benjamin Cardozo called for the creation of a law revision commission more than seventy years ago to help sort out the chaos of federal legislation,³⁴⁶ and he has been joined over the years by others,³⁴⁷ including Judge—now Justice—Ruth Bader Ginsburg.³⁴⁸ An active law revision commission could go a long way toward consolidating and updating statutes and removing archaic language, Latin expressions,

342. ESKRIDGE & FRICKEY, *supra* note 163, at 485-86 (relating the experience of oversight of the Civil Rights Act of 1964 as a function of the personalities involved); KEEFE & OGUL, *supra* note 10, at 362 ("Oversight is an 'intensely political activity.' Its performance varies with changes in political climate.").

343. As currently structured, the oversight process serves as part of the dynamic checking mechanism between Congress and the executive. Frequently, the oversight process is more a form of "guerilla warfare" on specific administration policies than it is an impartial evaluation of the "right" policies. See OLESZEK, *supra* note 149, at 277-78.

344. Canada has performed seven complete revisions of its federal statutes since Confederation in 1867. Peter E. Johnson, *Legislative Drafting Practices and Other Factors Affecting the Clarity of Canada's Laws*, 12 STATUTE L. REV. 1, 3-4 (1991).

345. Justice Cardozo noted in 1921 that in the countries of continental Europe the project had already "passed into the realm of settled practice." Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

346. Justice Cardozo envisioned a "Ministry of Justice" as a courier between the judiciary and the legislature, helping to keep communication open so Congress would be made aware of particularly troublesome statutes that might profitably be amended. *Id.* at 113-14.

347. See, e.g., Henry J. Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963) (proposing an agency to oversee and revise proposed legislation); Bernard S. Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 675-79 (1983); Roscoe Pound, *Anachronisms in Law*, 3 AM. JUDICATURE SOC'Y 142, 145 (1920) (proposing a "ministry of justice, charged with the responsibility of making the legal system an effective instrument for justice").

348. Justice Ginsburg has called for Congress to systematically take a "second look" at statutes, especially those identified by the judiciary as ambiguous. See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1429-34 (1987); Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1011-17 (1987).

transition provisions, and other obsolete material.³⁴⁹ Such a commission might also create an incentive for legislators—who want to see their enactments stay on the books—to pay closer attention to the effectiveness of the legislation being produced.

Several states operate such commissions,³⁵⁰ as do other major English-speaking industrial countries.³⁵¹ In fact, the United States already has such an office, called the Office of Law Revision Counsel.³⁵² Although on paper the Office of Law Revision Counsel's powers sound impressive,³⁵³ its modest staffing, limited compensation levels, and lack of participation by members of Congress translates into limited prospects for meaningful revision of federal statutes as a practical matter.³⁵⁴ Justice Ginsburg has suggested raising the functions of the Office to a more active status and putting members of Congress in charge of the operation.³⁵⁵ By invigorating the Office, the judiciary's task of deciphering legislation might be made easier and the quality of the legislative product may improve.

How directly such a commission would affect the legislative process is an open question. If political realities require the passage of a bad law, a bad law will be passed. Because law revision commissions have the power to recommend change, but not to enact it, their effectiveness rests on the legislature's taking action. Yet, the legislature's failure to act (or to act properly) is exactly the problem the law revision commission must wrestle with in the first place.³⁵⁶ As with oversight committees, the political process may frustrate attempts to enforce discipline on the lawmaking power of Congress.

349. Johnson, *supra* note 344, at 3-4.

350. In general, state law revision commissions fall into one of three models: (1) those that perform administrative duties and revise statutes, *e.g.*, Maine, ME. REV. STAT. ANN. tit. 1, §§ 91-95 (West Supp. 1992); Wisconsin, WIS. STAT. ANN. § 13.83 (West 1986 & Supp. 1993); (2) those that revise laws by unifying and reorganizing laws scattered throughout a state's statutes, *e.g.*, Maryland, MD. STATE GOV'T CODE ANN. §§ 2-1315 to 2-1318 (1984); and (3) those with broader powers to recommend substantive changes to the law, *e.g.*, California, CAL. GOV'T. CODE §§ 8280-8298 (West 1992); New York, N.Y. LEGIS. LAW §§ 70-72 (McKinney 1991). For a general discussion, see Catherine T. Clarke, Comment, *A Survey of the District of Columbia Law Revision Commission*, 34 CATH. U. L. REV. 1309 (1985).

351. For instance, Great Britain operates such a commission, *see* MICHAEL ZANDER, *THE LAW-MAKING PROCESS* 367-74 (2d ed. 1985), as does Canada, *see* Johnson, *supra* note 344.

352. *See* 2 U.S.C. § 285 (1988).

353. The Office of Law Revision Counsel is charged with proposing amendments to "remove ambiguities, contradictions and other imperfections both of substance and of form" from the federal statutes, 2 U.S.C. § 285b(1) (1988), the submission of recommendations for the removal of "obsolete, superfluous and superseded provisions," *id.* § 285b(2), and the periodic preparation and publication of the U.S. Code, *id.* § 285b(3).

354. Ginsburg & Huber, *supra* note 348, at 1432.

355. *Id.*

356. CALABRESI, *supra* note 325, at 63-64.

E. Institutionalize the Policy Analysis Function

Rather than focusing on post-enactment review, changing the legislative process in order to get the policy right in the first place may be a more profitable approach. One way to move toward that goal would be to modify the legislative process to ensure that every bill receives the benefit of some formal policy analysis. Many bills considered by Congress already undergo sophisticated policy analysis.³⁵⁷ Although Congress has developed some policy analysis expertise,³⁵⁸ a significant number of bills, like Truth in Savings, nevertheless slip through without ever being subject to a methodical analysis.

Because political influences can skew a problem framer's perspective of the world,³⁵⁹ it may be advisable to provide for a process whereby policy analysis can take place relatively free from the influence of unmitigated political power.³⁶⁰ Ultimately, the decision to pass a law must be a political one—and Congress possesses that power under the Constitution—but as a matter of public policy, it may make sense to get the legislative project off to an apolitical start.³⁶¹ The

357. See *supra* notes 20-24 and accompanying text.

358. Congress as an institution can carry out policy analysis through at least four congressional support offices: the Office of Technology Assessment, the General Accounting Office, the Congressional Budget Office, and the Congressional Research Service. See FOREMAN, *supra* note 334, at 16; KEEFE & OGUL, *supra* note 10, at 345.

359. See *supra* notes 181-82 and accompanying text.

360. The interaction of policymaking and politics is tidily summed up in the following passage:

Law-making would be a complex process if it consisted only of deciding how best to implement a particular policy through the statute book, but is in many cases inevitably and rightly complicated by disagreements over the policy itself. That, it may be thought, is the job of the politicians and the political parties and so, to a large extent, it is, but law-making is not solely the concern of politicians and political parties: it is a matter of taking effective, timely, and appropriate action and its complications and ramifications make it too serious a matter to be left to the politicians or, indeed, any one body of people of opinion.

Michael Rush, *Making Better Law: A Review of the Hansard Society Commission on the Legislative Process*, 14 STATUTE L. REV. 75, 75 (1993).

361. Despite the desire to make Congress into an efficient and rational policymaking organ, however, it would be foolhardy and undesirable to eliminate all political elements from the legislative process. Congress is a political body and it may in fact serve more important functions than merely solving problems. For instance, it may serve primarily as a mechanism for harnessing political forces through debate, oversight, and constituent representation in such a way to keep a check on the government as a whole. It may also be that Congress does solve problems, but does so in a much more subtle and complex way than formal policy analysis can take in. See FOREMAN, *supra* note 334, at 1-10. Some scholars have suggested that critiques of Congress that focus on rationality and effectiveness miss the point because they equate "effectiveness" of legislation in the public policy sense with effectiveness of the representative role, which are different matters altogether, and because they fail to deal with the contextual constraints placed on the institution. See Joseph Cooper, *Assessing Legislative Performance: A Reply to Critics of Congress*,

creation of an extra-political³⁶² policy analysis office—an Office of Public Policy—may lead toward more coherent regulation and legislation.³⁶³

Exactly how such an office would operate in its many details is beyond the scope of this Article. One could, however, imagine a change in the legislative process where all congressional committees, administrative agencies, and executive branch departments would be required to send all new legislative proposals to the Office of Public Policy, along with a report on the public policy analysis of the bill, if any, that had already been performed. The Office of Public Policy's first action upon receiving a proposal would be to determine whether considering the proposal merits the expenditure of congressional resources. This initial screening step would weed out the vast majority of bills.³⁶⁴

13 CONGRESS & THE PRESIDENCY 21, 22-26 (1986), *reprinted in* CONGRESS, *supra* note 162, at 809. Casting the legislative process as a straightforward problem-solving activity may fail to encompass the process' dynamic give-and-take nature and the "hard fought compromises" reflected in the statutes provisions. *See* Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986).

362. Many independent agencies in the federal government are set up in such a way as to minimize the force of the political winds. Although some agencies nevertheless end up subject to political influences, *see* Cutler & Johnson, *supra* note 122, at 1402-05; Strauss, *supra* note 122, others—such as the Federal Reserve Board—maintain a meaningful degree of independence, *see* Sunstein, *supra* note 69, at 427 n.89. Of course, creating a truly apolitical organization composed of human beings is probably an impossible task, and lack of political accountability brings its own set of problems. *See supra* notes 268-70. To promote the extra-political nature of the Office of Public Policy, its staff might be required to develop along certain lines. For instance, to minimize the power of seniority, prevent the creation of policy fiefdoms, and foreclose the natural process of ossification that seems endemic in bureaucracies, the permanent employees of the Office of Public Policy might be required to step down after some set period of time, perhaps five years. To provide continuity, the staff might be broken up into five different groups, one of which would be required to move on in a given year.

363. The idea of an independent policy analysis body to assist the legislature has a long pedigree. John Stuart Mill advocated the creation of a "Commission of Legislation" in the mid-nineteenth century. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 237-39 (H.B. Acton ed., E.P. Dutton & Co. 1980) (1861). More recently, Professor Sunstein has suggested the creation of a similar agency in either the executive or the legislative branch. SUNSTEIN, *supra* note 313, at 108. The approach outlined here expands on that idea and ties it into the legislative process. An Office of Public Policy could result from a consolidation and expansion of the policy analysis functions provided by the Congressional Budget Office, the Office of Technology Assessment, the Congressional Research Service, and the General Accounting Office. The current scattered policy-analysis functions may be a relic of an earlier era in congressional organization that stressed decentralized power and perhaps should now evolve into the more centralized nature of the congressional structure. *See* Roger H. Davidson, *The New Centralization on Capitol Hill*, 50 REV. OF POL. 345 (1988), *reprinted in* CONGRESS, *supra* note 162, at 829.

364. Of the nearly 10,000 bills introduced during the 99th Congress, for instance, the number actually enacted was only 663. Most of the bills that were introduced had no chance of passage and were often proposed by legislators who had no intent that they actually become law. OLESZEK, *supra* note 149, at 81-83. Many of those inconsequential

Proposals that did not clear this first screening would be sent back to the appropriate congressional committee without further action by the Office of Public Policy. Congress would then be free to act on those bills or not, depending on the political realities of the particular proposal.³⁶⁵

For proposals surviving the first cut, the Office of Public Policy would then examine the supporting analysis accompanying the bills. If sufficient, the Office of Public Policy would not repeat the analysis, but would forward the bill and its supporting analysis back to the responsible congressional committees.³⁶⁶ For the remaining bills, the Office of Public Policy would group them into subject matter groups and undertake a rigorous policy analysis, beginning with a thorough examination of the problem. To make the problem identification step as meaningful as possible, the Office of Public Policy would have to address underlying issues, rather than the language of a proposed bill.³⁶⁷ By separating the underlying policy from the statutory language, the Office of Public Policy's analysis would be free to move in the best direction, rather than being shackled to the language of a proposed bill.

bills were "commemoratives," *see supra* note 149, which would not require any policy analysis. In addition, a significant portion of the bills before Congress deal with administrative matters. These bills amounted to 11% of all legislation in a recent Congress. *How CONGRESS WORKS*, *supra* note 149, at 43. These bills, too, would not require explicit policy analysis.

365. Many of those inconsequential bills will nevertheless be enacted into law. Congress has long recognized the reality that most legislation is not important. The House has several short-cut methods of disposing of bills that clearly do not require consideration by the full House. The House consent calendar, the private calendar, and the procedure for suspending the rules, among other procedural mechanisms, allow the House to dispose of insignificant or noncontroversial bills without wasting the time of the entire body. *How CONGRESS WORKS*, *supra* note 149, at 46-49. In essence, an Office of Public Policy would create a special track for legislation at the other end of the spectrum, so substantial bills would be channelled into a special process as well.

366. Congress might want to undertake a separate policy analysis of bills that originate in the executive branch as a matter of political power between the branches.

367. Canada already has a process built into its parliamentary system that attempts to start legislation from the policy stage. Johnson, *supra* note 344, at 2. In Canada, bills originate primarily with the government. *See CANADA DEP'T OF JUSTICE, THE FEDERAL LEGISLATIVE PROCESS IN CANADA* 9 (1987). All proposals for new legislation must be sponsored by a Cabinet Minister. The Cabinet Minister proposing legislation must present the idea to the Cabinet as a whole through a "Memorandum to Cabinet." The Memorandum to Cabinet is a policy paper only—it cannot contain statutory language or be accompanied by a draft bill. In this way, the Canadian system attempts to ensure that legislation starts with a coherent policy objective and that the statutory language reflects the policy, rather than having the policy be shaped by proposed legislative language. The emphasis on the policy, rather than the specific language of the law may in large part be a function of Canada's bilingual status and the need to make sure both the anglophone and the francophone drafters assigned to the bill are drafting with the same policy in mind. *See id.* at 9-10; *cf.* Johnson, *supra* note 344, at 2.

The Office of Public Policy might approach its task by assembling teams of industry professionals, activists, academics, and others to give a balanced perspective on the various issues. The teams would serve on an ad hoc basis to avoid the problems that go along with a seniority system and the drawbacks of the permanent editorial board system discussed earlier. In carrying out their work, the policy team would employ a method similar to Professor Seidman's approach as a helpful guide in the systematic exploration of the issues.³⁶⁸ The Office of Public Policy might be required to examine each alternative proposed solution and evaluate its potential effectiveness.³⁶⁹ The Office of Public Policy would also be required to test the theories upon which the problems are grounded, to use empirical methods to evaluate the seriousness of the problems, and to evaluate the expected effectiveness of the various proposed responses.³⁷⁰

Finally, as part of its evaluative process, the Office of Public Policy might be required to analyze the proposed solutions in light of the larger regulatory scheme to ensure that the new proposals were consistent with other laws, not redundant, and, most importantly, coherent in light of the general regulatory policy. After completing the entire policy analysis process, the Office of Public Policy would then report its findings to Congress. Congress would then deal with the

368. See *supra* notes 274-84 and accompanying text.

369. Again, Professor Seidman's approach provides a good framework for the types of analysis that should be undertaken for each alternative response. The report of the Office of Public Policy should describe each proposed solution and show how it addresses the causes earlier explicated, as well as include a cost-benefit analysis of the proposed legislation. Seidman, *supra* note 5, at 65. In order for the proposed solution to be adequate, it must do the following: (1) fit with the explanations advanced; (2) have a high probability of inducing the problem-correcting behavior desired; and (3) be cost effective. *Id.* at 67-74.

370. As currently structured, the legislative process does not explicitly require empirical testing of assumptions, or the collection of data to see if a problem exists, or the testing of a proposed solution's effectiveness. In the history of Truth in Savings, for instance, the limited empirical evidence of the problem came from the Consumer Federation of America's survey of the pricing of retail banking products and services. See, e.g., Jack Reerink, *Consumer Account Fees Up 28% Since '90, Poll Finds*, BANKING Wk., June 14, 1993, at 12. Although the Consumer Federation of America admitted that its study was neither scientific nor based on a statistically valid sampling, see *CFA Study*, *supra* note 49, the study nevertheless enjoyed wide currency, probably because it was one of the few studies that attempted to quantify the perceived problems in deposit accounts. Additionally, the current legislative process does not effectively work with empirical data to reach policy decisions, but frequently uses data merely as a way to justify existing policy choices. See, e.g., Rubin, *supra* note 1, at 276 (describing role of empirical data in the adoption of the Truth in Lending Act). For instance, even if one accepts the Consumer Federation of America survey as empirical evidence for the existence of a "problem" involving deposit accounts, it nevertheless leaves open the larger question of whether a causal link exists between the amount of information disclosed or that would be required under Truth in Savings and the cost of maintaining deposit accounts.

analyzed bills as it does presently, the major difference being that after a proper analysis of the problem, the legislative process might have a better start.

The weaknesses in such an approach are many. First, creating a new bureaucracy may only serve to replicate the political forces that distort the policy process in Congress. By virtue of its existence as an organization, the Office of Public Policy would place a great deal of power in the hands of the agenda setter.³⁷¹ Attempts to make the Office extra-political would not prevent the agenda setter from exercising his or her power, whether consciously or unconsciously. Of course, the very idea of an extra-political entity may be viewed with some skepticism.

Another drawback to this approach is that it would delay the legislative process. Certainly, in the thick of legislative negotiations each new amendment offered to a comprehensive bill could not go through the Office of Public Policy. While the diversion of an issue into this track may result in the bill's being delayed for some time, it should be noted that under our current system important or controversial bills rarely pass in the Congress in which they are introduced.³⁷²

The prospects for improving legislation through structural changes in the legislative process deserve closer study, and perhaps even empirical research. The matter of improving the effectiveness of legislation is too important to ignore. If we continue to look at legislation as a method of solving problems, we need to change the system to facilitate that process. We may never determine the "right" way to make laws, but as scholars focus attention on the problem-framing process, merely raising awareness of the issue may improve the legislative process.

CONCLUSION

Problem solving lies at the heart of the legislative enterprise. Yet, for a significant portion of bills considered during a session of Congress, no process exists for rigorously identifying the problem addressed by the proposed legislation. Failure to identify problems imposes a great cost on the legislative process. Congressional resources may be squandered addressing matters that are not real problems. Even if Congress responds to a real issue, failure to identify

371. For a discussion of the powers of the agenda setter, *see supra* notes 225-42 and accompanying text.

372. *HOW CONGRESS WORKS*, *supra* note 149, at 42.

the specific problem makes evaluating the proposed policy difficult, if not impossible.

Congress fails to rigorously identify problems for many reasons, most of which are built-in consequences of legislative politics. Nevertheless, Congress could change the legislative process in hopes of promoting a better problem-solving methodology. The proposals suggested so far have both benefits and drawbacks. A closer examination of these alternatives is in order, however, to prevent promulgating ineffective legislation like Truth in Savings.